Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant Appellants,
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court
For the District of Arizona

BRIEF OF ACLU FOUNDATION OF SOUTHERN CALIFORNIA; ARIZONA CIVIL LIBERTIES UNION; AMERICAN FRIENDS SERVICE COMMITTEE;

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; ARIZONA STATE AFL-CIO; COMMUNICATION WORKERS OF AMERICA; FRESH FRUIT AND VEGETABLE WORKERS LOCAL 78-B, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA AFL-CIO; INTERNATIONAL LADIES GARMENT WORKERS UNION; INTERNATIONAL WOODWORKERS OF AMERICA; LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 383;

Additional Amici and
Attorneys for Amici Curiae
See inside cover.

COLORADO MIGRANT LEGAL SERVICES, INC.; EVERGREEN LEGAL SERVICES, FARMWORKER DIVISION, ON BEHALF OF ERNESTO NALDONADO AND NARCISO JUAREZ; MARICOPA COUNTY LEGAL AID, MIGRANT DIVISION; MIGRANT LEGAL ACTION PROGRAM, INC.; NATIONAL ASSOCIATION OF FARMWORKER ORGANIZATIONS; NEW JERSEY LEGAL SERVICES, MIGRANT DIVISION; OREGON LEGAL SERVICES, FARMWORKER OFFICE;

NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.; SYNAGOGUE COUNCIL OF AMERICA; UNITED STATES CATHOLIC CONFERENCE; ARIZONA CATHOLIC CONFERENCE; ARIZONA ECUMENICAL COUNCIL; AGRICULTURAL MISSIONS, INC.; BOARD OF DIRECTORS OF THE SISTERS OF CHARITY, B.V.M.; CHURCH WOMEN UNITED; CENTRAL CONFERENCE OF AMERICAN RABBIS; CATHOLIC COMMITTEE ON URBAN MINISTRY; CLARETIAN MISSIONARIES, WESTERN CONFERENCE; COMMISSION ON POVERTY & ECONOMIC JUSTICE, OHIO COUNCIL OF CHURCHES; COUNCIL OF CHURCHES OF SANTA CLARA COUNTY; DEPARTMENT OF MISSIONS, AFRICAN METHODIST EPISCOPAL CHURCH; DEPARTMENT OF CHURCH AND SOCIETY, DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); DIVISION OF HUMAN RELATIONS, BOARD OF CHURCH & SOCIETY, UNITED METHODIST CHURCH; FLORIDA CHRISTIAN MIGRANT MINISTRY; FRANCISCAN FRIARS OF CALIF. (PROVINCE OF ST. BARBARA); GENERAL COUNCIL, SISTERS OF ST. JOSEPH OF CARONDELET; ILLINOIS FARM WORKER MINISTRY; LAS HERMANAS; MICHIGAN FARM WORKER MINISTRY COALITION; MICHIGAN COUNCIL OF CHURCHES; NATIONAL MINISTRIES, AMERICAN BAPTIST CHURCHES; NATIONAL

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On Appeal from the United States District Court For the District of Arizona

INTEREST OF THE AMICI[1]

This case presents the question whether and to what extent farm labor unions, migrant farm workers and the public may communicate and organize meaningfully regarding substantial

[1]The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

issues of labor dispute within Arizona. The Court's decision, therefore, will necessarily affect organizations and individuals that share interests similar to each of the groups participating here as amici curiae. At the same time, review by this Court will also reach broader issues that concern organized labor, all workers and the public at large.

Amici believe that the large number of interests implicated in this matter is most efficiently served through the submission of one consolidated brief. Accordingly, although the statement of interests is presented in several separate sections below, only one brief follows that statement.

A. *United Automobile Workers and Other Labor Organizations.*

The United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) is a labor organization representing approximately 1.5 million active and retired members throughout the United States. Of these, approximately 2400 UAW members, plus their families, reside in Arizona. As a labor union, the UAW has a fundamental interest in any labor statute, such as the AERA, which affects the rights of workers to organize and bargain collectively. Moreover, the UAW has gained considerable experience with agricultural employment relations legislation in the course of its long, close association with the UFW in California and elsewhere.

Similarly, the other labor organizations participating as amici curiae—Arizona State AFL-CIO; Communication Workers of America; Fresh Fruit and Vegetable Workers Local 78-B, Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO; International Ladies Garment Workers Union; International Woodworkers of America; and Laborers International Union of North America, Local 383—share the

interest and concern expressed by the UAW over the AERA's significant impact on the rights of Arizona's farm workers to organize and bargain collectively.

B. *Religious Organizations.*

For nearly 60 years religious groups have been seeking to serve the needs of seasonal and migrant farm workers as an integral part of their mission responsibility. In providing for worship and in rendering works of charity the churches have been drawn inevitably to the struggle for justice in the fields. "Action on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of preaching the gospel . . . ." (Roman Catholic Synod of Bishops, 1971).

Catholic, Protestant and Jewish religious leaders have consistently been present during farm worker strikes and boycotts as a witness to and a participant in the legal and moral issues involved in the unionizing efforts of the United Farm Workers of America.

Indeed, representatives of every organization signing this brief have joined in ecumenical delegations to growers, supermarket owners and managers, public groups and consumers. They have stood on picket lines and distributed leaflets. The purpose of these actions has been to describe the plight of farm workers and their families, to communicate the nature of the farm workers' non-violent movement, and to call on corporate decision-makers to use their influence on behalf of beneficial, non-violent social change in our country.

Submission of this brief is consistent with and integral to maintaining the above tradition of social responsibility and fulfilling the above purpose of securing constitutional rights for farm workers.

C. ***Migrant Legal Action Program and Other Migrant Legal Services and Farm Worker Organizations.***

The Migrant Legal Action Program (MLAP) is a national legal services support center funded by the Legal Services Corporation. MLAP provides direct assistance to Legal Services offices throughout the country, including Arizona, on issues affecting migrant and seasonal farm workers. In addition, MLAP advocates directly on behalf of farm worker clients on national policy issues.

MLAP is interested in this action from two points of view. First, MLAP represents, directly or through assistance to local Legal Services offices, many farm workers in Arizona whose constitutional rights and economic needs require affirmance of the decision below. Secondly, as a national policy advocate, MLAP is vitally concerned with protecting the rights of farm workers in every state to organize and bargain collectively free of unduly restrictive state legislation. Therefore, amicus MLAP joins the appellees in requesting the affirmance of the judgment below, invalidating the Arizona Agricultural Employment Relations Act.

Similarly, other farm worker organizations and migrant legal services—National Association of Farmworker Organizations, Colorado Migrant Legal Serivces, Inc., Evergreen Legal Services, Farmworker Division, on Behalf of Ernesto Naldonado and Narcisco Juarez, Maricopa County Legal Aid, New Jersey Legal Services and Oregon Legal Services—share the interest and concern expressed by MLAP.

D. ***American Friends Service Committee.***

The American Friends Service Committee has since 1917 been active in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. The AFSC carries out its work

on behalf of the several branches of the Religious Society of Friends in America. The AFSC has a vital interest in this litigation because of Friends' belief in the infinite worth of each human being and the equality of all human beings in the sight of God. This testimony has led the AFSC to commit a significant portion of its resources to work which seeks to root out the causes of violence in our society which lie in poverty and imbalance of wealth, in exclusion and denial of rights.

Since the early 1950's in California, 1960's in Florida and other East Coast areas, and for the last 10 years in Texas, AFSC has taken part in efforts designed to gain for farm workers a greater degree of control over their living and working conditions. In 1976 the Commonwealth of Pennsylvania contracted with the AFSC for a study of the state role and responsibilities in recognizing farm worker needs and rights.

This experience makes it clear to AFSC that fundamental rights are at stake in the present lawsuit. The Arizona law under review contains extensive barriers to consumer boycotts. AFSC, like many religious groups, supported and participated in the boycotts of grapes and lettuce. The boycotts were an effective and necessary tool to educate the public on issues involved in the farm worker struggle. They were an exercise of free speech in pursuit of economic justice for farm workers. Should the 1972 Arizona law be upheld, the AFSC would be denied the right to such expressions of opinion and beliefs and the right to associate with farm workers and others in their efforts to gain dignity and justice.

This litigation also involves the issue of access to workers on ranches and in camps. Our experience tells us that such access is essential if there is to be any reality to the right of farm workers to join the union of their choice. Such access is also essential to the work of organizations who seek to meet with farm workers on a host of issues of common concern, as does

the AFSC. The AFSC and others who carry out programs with farm workers would suffer severe limitations in effectiveness were we denied access to camps and ranches. Farm workers would suffer a denial of the right to invite and receive visitors in their homes.

E. *ACLU Foundation of Southern California and Arizona Civil Liberties Union.*

For 57 years, the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of persons within the United States. The ACLU Foundation of Southern California and the Arizona Civil Liberties Union are regional affiliates of the American Civil Liberties Union.

The ACLU has traditionally supported the rights of labor unions and of workers to organize and bargain collectively to improve conditions of employment. The ACLU Foundation of Southern California, for example, was born out of a labor dispute in which striking workers were denied the right to read the Declaration of Independence on the strike line.

The Arizona Agricultural Employment Relations Act represents an apparent, calculated effort to strip farm workers of the ability to organize meaningfully. As if drafted from a manual authored by organized labor's staunchest foe, the AERA reduces to chance the likelihood of successful union activity in any of the following areas: elections, bargaining, access to workers, organizing campaigns, public support campaigns, strikes and boycotts. Put candidly, if the statute survives constitutional challenge, unions will be unable to represent and to service Arizona farm workers. At the same time, implicitly, fundamental rights of speech and association will have been forfeited at the expense of perhaps this society's most oppressed and powerless class, and in the interest of pure economic motives.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The restrictive provisions of Arizona's Agricultural Employment Relations Act (AERA) directly infringe the speech and association rights of Arizona's farm workers and of its labor organizations and their members. By interfering with the free flow of information concerning agricultural labor relations, the AERA also threatens the First Amendment rights of all members of the public, who have a direct and substantial interest in full and free discussion relating to the conditions affecting Arizona's farm workers and the causes of agricultural labor disputes.

The constitutional defects in the AERA are patent. Although the appellants make an effort to defend the provisions struck down by the three-judge district court, the real issues raised in their appeal are not whether the AERA violates the First Amendment, but whether it was proper for the three-judge court to decide at this time that the AERA imposes unconstitutional restrictions on the appellees' fundamental rights. Indeed, the appellants do not begin their argument concerning the constitutionality of the AERA until well past the mid-point of their opening brief. The major focus of their brief is an attack on the three-judge district court's determination that the appellees' challenge to the AERA satisfies the Article III requirement of a "case or controversy" and its further determination that there was no need to defer decision on the constitutional issues pending construction of the AERA by the Arizona state courts. By concentrating on these issues of justiciability and abstention, the appellants apparently hope to postpone for as long as possible the inevitable invalidation of the AERA.

The first half of amici's brief will demonstrate that the three-judge court correctly decided these important, threshold issues. In the second half of this brief, amici will show that the court properly held that the AERA's restrictions on consumer publicity and its limitations on access between union organizers

and farm workers residing in farm labor camps violate the appellees' First Amendment rights. By thus focusing on these important issues, amici, of course, do not intend to suggest that they are not in full agreement with the three-judge court's resolution of the other constitutional issues raised by the AERA's restrictions on the rights of Arizona's farm workers and farm labor organizations.

A. The AERA is at bottom a criminal statute. Section 23-1392 of the AERA makes criminal violation of any provision of the Act. Thus, the existence of an Article III case or controversy must be measured by the standards enunciated by this Court in the context of federal declaratory actions that challenge the constitutionality of criminal statutes.

A case or controversy is present in such declaratory actions when it is clear that the plaintiff genuinely desires to engage in, or is likely to engage in, the arguably protected activities, and where there is no reason to believe that threat of prosecution to the plaintiff is not credible. The three-judge court's findings of fact and the record upon which those findings were based establish that the appellees have satisfied both of these requirements. Prosecution under the challenged provisions of the AERA is not an imagined fear. Those provisions bear directly upon the constitutionally protected activities of the appellees. They contain proscriptions that the appellees—like the real estate agent in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), the teacher in *Epperson v. Arkansas,* 393 U.S. 97 (1968), the doctor in *Doe v. Bolton,* 410 U.S. 179 (1973), and the vendor in *Craig v. Boren,* 429 U.S. 190 (1976)—reasonably and necessarily desire to test in order to fulfill their professional responsibilities.

An Article III case or controversy also exists because the AERA is a broad regulatory scheme whose very existence has a direct and immediate impact on the appellees. Again, the three-judge court's findings of fact establish that the AERA has already taken considerable toll upon appellees. Growers,

employers and the AERA-created Agricultural Employment Relations Board have enforced the statute's provisions against the UFW. The enactment and presence of the AERA has in and of itself impaired efforts of the Union and Arizona farm workers to organize.

An Article III case or controversy also exists under this Court's First Amendment overbreadth cases. In cases raising meaningful First Amendment questions, the federal courts are required to pass upon the potential application of a statute to conduct which is not before it, and which may bear no connection to the activities of the party adjudicating the claim. The appellees satisfy the requirements for application of this doctrine. The overbreadth of the AERA is both real and substantial. Indeed, appellees are not concerned with a rare or relatively insignificant application of the provisions of the AERA, but rather complain of the most probable application of these provisions as they in fact affect their rights of expression and association. Accordingly, appellees have presented an overbreadth controversy that is both real and immediate.

Having correctly determined that the appellees' challenge to the AERA presented a live, justiciable controversy, the three-judge district court properly refused to abstain from deciding the substantial federal constitutional questions raised by the language of the AERA. Abstention is a judge-made doctrine that vests discretion in the district court to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. Abstention is proper, however, only when the underlying state statute is reasonably susceptible of an interpretation that avoids the necessity for constitutional adjudication.

The challenged provisions of the AERA are all unambiguous. None of those provisions is "fairly" or "reasonably" susceptible of a limiting construction that eliminates the constitutional infirmities found by the three-judge court. Even were there uncertain issues of state law, however, abstention

would be inappropriate in view of the delays already suffered by appellees and the significance of the constitutional claims they are advancing in this lawsuit.

B. The three-judge district court's First Amendment holdings are solidly grounded in established law concerning freedom of speech and association and therefore should be affirmed. Meaningful consideration of the constitutionality of Arizona's legislative restrictions on the rights of agricultural workers to organize and to bargain collectively, however, must begin with a general understanding of the economic and social problems confronting those workers.

The abysmal living and working conditions of farm workers have been well-documented. Indeed, concern for their health and well-being has led the federal government to create and fund a variety of special programs designed to ameloriate their working conditions and to satisfy at least some of their basic, human needs. Governmental programs, however, are inherently ineffective; for they fail to address the root causes of farm workers' problems—problems grounded in the grower-farm worker employment relationship. As was true in the industrial context, union organization and collective bargaining, not government aid programs, are needed to create meaningful and lasting improvements in the lives of these workers. Because of the importance of this background information to the constitutional issues now before the Court, amici have attached as an appendix a brief review of some of the voluminous, relevant material published concerning the plight of this country's agricultural workers.

The urgent need for meaningful collective bargaining, demonstrated by the material summarized in the appendix, underscores the intolerable nature of the AERA's restrictions on farm workers' rights to organize and to bargain collectively with Arizona growers. In the second half of this brief, amici

will show that those restrictions are not only an affront to recognized public policy, but also an unconstitutional infringement on the appellees' First Amendment rights.

C. This Court has long recognized that free discussion concerning the nature and causes of labor disputes is indispensable to the effective uses of modern government and that communications relating to labor disputes are fully protected by the First Amendment. This constitutionally mandated public policy encouraging uninhibited debate on all issues underlying labor disputes stands in marked contrast to Section 23-1385(B)(8) of the AERA, which makes criminal any "untruthful" speech directed at ultimate consumers of agricultural products, and Section 23-1385(C) of the AERA, which authorizes growers to deny access between farm workers and union organizers. Each of these sections, in addition, establishes a system of prior restraints that impermissibly restricts the appellees' rights of expression.

Section 23-1385(B)(8) purports to impose a test of truthfulness on the legality under state law of otherwise constitutionally protected speech. Such a test has been unequivocally rejected by this Court. In *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Court held that to provide the breathing space necessary to promote free, uninhibited debate on public issues, a state may impose sanctions only if the questioned statement is made with "actual malice"—that is, with knowledge that it was false or with regardless disregard of the truth. The *New York Times* "actual malice" standard has also been held to be required by federal labor law to guard against "unwarranted intrusion upon free discussion." Far from requiring a showing of "actual malice" before imposing a sanction for "untruthful" speech, Section 23-1385(B)(8) purports to impose liability without fault. Accordingly, this section is an unconstitutional infringement on the appellees' free speech rights.

Section 23-1385(B)(8) may be enforced not only by after-the-fact sanctions, but also by cease-and-desist orders and restraining orders designed to prevent future occurrences of the conduct proscribed by that section. The AERA's procedures thus establish a classic system of prior restraints. No adequate justification for such a restraint has been offered. In fact, the purpose of this restraint on appellees' speech is solely to safeguard private, economic interests. Quite apart from § 23-1385(B)(8)'s overbroad restriction on "untruthful" consumer publicity, therefore, this section was properly held to be facially invalid under the First Amendment.

Section 1385(C) of the AERA is similarly invalid. That section authorizes growers to deny union organizers all access to their land and thus to the farm labor camps in which many agricultural workers reside. Such authorization, under this Court's holding in *Reitman v. Mulkey,* 387 U.S. 369 (1967), impermissibly involves the State in "private" infringements on free expression. The right of a private employer to prohibit all union communications with workers is now one of the basic policies of the State and is therefore unconstitutional.

Quite apart from this state involvment, § 23-1385(C) works an impermissible deprivation of First Amendment rights in view of the three-judge court's findings concerning the nature of farm labor camps. The court found that migrant labor camps were permanent residential communities for the Arizona farm worker. Migrant camps are thus the functional equivalent of the company town in *Marsh v. Alabama,* 326 U.S. 501 (1946); for like the company town, the migrant labor camp so governs its residents' lives that they lose their capacity to interact freely and frequently with the community at large. Accordingly, the fact of private ownership alone cannot forfeit the constitutional rights of the farm labor camp's residents, including the right to communicate with the appellees concerning union organization.

II. APPELLEES' CHALLENGE TO THE CONSTITUTIONALITY OF ARIZONA'S AGRICULTURAL EMPLOYMENT RELATIONS ACT CREATES A LIVE CONTROVERSY AND DOES NOT ATTEMPT TO OBTAIN AN ADVISORY OPINION

The three-judge district court held that appellees' challenge to Arizona's Agricultural Employment Relations Act (AERA) creates a live, Article III case or controversy. (449 F.Supp., at 451-55; Appendix at 462-70.) That holding is consistent with the long line of cases from this Court explaining the case or controversy requirement in declaratory actions against criminal statutes and in actions challenging broad regulatory statutes with direct impact on the litigants. In addition, the three-judge court's case or controversy holding is supported by this Court's decisions in cases challenging regulatory statutes on the grounds of First Amendment overbreadth.

A. *The Agricultural Employment Relations Act Is A Criminal Statute. The Likelihood Of Enforcement Of That Statute Against Appellees' Conduct Is Both Real And Immediate.*

1. Introduction: The Case or Controversy Requirement in Declaratory Actions Against Criminal Statutes.

The purpose of a federal declaratory action which challenges the constitutionality of a criminal statute is to protect a person from prosecution where threat of criminal sanctions will deter that person from engaging in arguably constitutionally shielded activities. It permits the important "issue [to be] raised before rather than after the challenged step is taken, the litigant being enabled to look before he leaps rather than to risk having to pick up the pieces after a leap in the dark." Borchard, Declaratory Judgments 930 (2d ed. 1941).

Case or controversy therefore exists where the constitutional challenge satisfies two requirements:

1. Where it is clear that the plaintiff genuinely desires to engage in, or is likely to engage in, the arguably constitutional activities; and

2. Where there is no reason to believe that threat of prosecution to the plaintiff is not credible. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 144 n.29 (1974).

The law challenged by the plaintiff-appellees in this case, the AERA, is at bottom, a criminal statute. Section 23-1392 of the Act reads in pertinent part:

> "Any person . . . who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year or both. . . ."

Appellees UFW, Gutierrez, Alaniz, Varela and Rose have thus stated a case or controversy if this action meets the above requirements. As the following discussion demonstrates, this Court would have to upset its previous decisions and reject its prior reasoning to endorse appellants' argument that no such statement has been made.

2. The Applicable Case Law and Its Supporting Rationale.

Within the last decade this Court has on several occasions examined the case or controversy requirement in the framework of a constitutional challenge to a criminal statute. Just last Term, for example, the Court unanimously found case or controversy where the owner of and the agent for certain real estate brought suit against an ordinance which prohibited the posting of "For Sale" or "Sold" signs. *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). While the case was pending before the Court of Appeals, the plaintiff owner sold the land at issue. 431 U.S., at 86 n.1. Despite the fact that

the agent had not alleged that he desired to post "For Sale" signs on any other property within Willingboro[2], and despite the fact that the complaint and record contained no mention of any threatened or actual prosecution under the ordinance[3], the Court adjudicated the claim. It thereby held:

> "[A]t least as to petitioner Mellman, the real estate agent, there plainly is an 'immediate prospect,' *Steffel v. Thompson,* 415 U.S. 452, 459-460 (1974), that he will desire to place 'For Sale' signs on other property in Willingboro, and thus there remains a controversy 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Cas. Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)." 431 U.S., at 86 n.1.

In *Linmark,* then, common sense appreciation of existing circumstances left little doubt that the plaintiff's livelihood demanded that he test the proscription, that enforcement against such conduct was not a fanciful possibility, and that therefore fears of prosecution were not irrational.

The possibility of enforcement must be real and immediate, but it need not be imminent. In *Epperson v. Arkansas,* 393 U.S. 97 (1968), a teacher attacked an anti-evolution statute on vagueness and other First Amendment grounds as prohibiting her from utilizing certain textbooks or from teaching Darwinian theory. The statute reasonably appeared moribund; no prosecutions had ever been recorded under it in its 40 years of existence. Still, the Court held that the law placed the plaintiff in a "literal dilemma," 393 U.S., at 100, and consequently found the controversy properly justiciable:

> "It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal of right is properly here, and it is our duty to decide the issues presented." 393 U.S., at 102.

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[2]See Appendix in *Linmark,* pp. A-2 to A-5.

[3]*Ibid.*

Similarly, Georgia-licensed doctors consulted by pregnant women were held to present an Article III controversy in their suit against the State's abortion laws. *Doe v. Bolton,* 410 U.S. 179 (1973). None of the plaintiff-physicians had ever been prosecuted, nor had any ever been threatened with prosecution. 410 U.S., at 188. Once more, however, this Court refused to dismiss the potential for criminal action against the interested plaintiffs:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenridge,* 446 F.2d 833, 839-840 (CA 6 1971); *Poe v. Menghini,* 339 F.Supp. 986, 990-991 (D. Kan. 1972)." 410 U.S., at 188.

The plaintiff in *Craig v. Boren,* 429 U.S. 190 (1976), was a licensed vendor of 3.2% beer who sought declaratory relief against two Oklahoma statutes that prohibited the sale of such beer to males under the age of 21 and to females under the age of 18. As in the above cases, no prosecutions or threatened prosecutions had at any time been recorded against the plaintiff. Her concern about possible criminal proceedings, however, was held sufficient to require resolution of her federal causes of action:

> "The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, 'sanctions and perhaps loss of license.' Tr. of Oral Arg. 41. This Court repeatedly has recognized that such injuries establish the threshold requirements of a case or controversy mandated by Article III." 429 U.S., at 194 (citations omitted).

See also id., at 196 n.5 ("[C]ertainly, no suggestion will be heard that Whitener's anticipatory challenge offends the normal requirements governing such actions.").

Plaintiffs in *Linmark, Epperson, Doe* and *Craig* met the two-pronged test stated previously. In each case the plaintiff desired to engage in, or was likely to engage in, the activity that was alleged as constitutionally protected. Indeed, conduct of this activity was essential to the fulfillment of the litigant's professional responsibility; forbearance would have crippled each plaintiff's moral, ethical or financial livelihood.

Moreover, in each case there was not sufficient reason to believe that threat of prosecution to the plaintiff was not credible. There was not solid enough proof to be confident that law enforcement would ignore its sworn obligation to uphold the law against persons who plainly would be violating it in reasonably notorious fashion. The records contained no pledges from officials that the challenged statutes would be overlooked in plaintiffs' cases.

By comparison, where suits have failed for Article III reasons litigants were typically unable to satisfy one element of the test. Thus, in *Younger v. Harris,* 401 U.S. 37, 42 (1971), appellees Dan, Hirsch and Broslawsky had their cause dismissed where none "claim[ed] that they ha[d] ever been threatened with prosecution, that a prosecution [was] likely, or even that a prosecution [was] remotely possible."

The Court in *Steffel v. Thompson,* 415 U.S. 452, 459 (1974), found an "actual controversy" because the plaintiff alleged threats of prosecution which could not be characterized as "imaginary or speculative." However, the threats centered on activity undertaken by plaintiff in 1970 in protest of the Vietnam War. Since the suit did not reach this Court until four years later, when American involvement had changed mate-

rially, the Court questioned the credibility of a continuing threat. It consequently remanded the case to the District Court "to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents a 'substantial controversy'. . . ." 415 U.S., at 460.

Likewise, in *Ellis v. Dyson,* 421 U.S. 426, 434 (1975), the Court remanded under *Steffel* to determine if two petitioners had alleged "a sufficiently genuine threat of prosecution for possible future violations" of a Dallas loitering statute. Notably, Justice Blackmun for the Court expressed skepticism that "a credible threat" endured; he emphasized for guidance of the lower court that counsel for petitioners confessed in oral argument that "they had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts." *Ibid.*

The Court's approach to Article III problems thus focuses upon what would reasonably appear to be the likely impact of the criminal statute at issue upon the subject plaintiff's desired practice of his alleged constitutional activities. It is strongly subject-oriented, although it does not blink reality. Consistent with the goals of an organized society, the approach "assumes the function of limiting violence, promoting individual security and maintaining a degree of social equilibrium." Borchard, *supra,* at 3. As stated previously and as spelled out in *Steffel, supra,* 415 U.S., at 495, the underlying policy thereby vindicated is a simple but fundamental one:

> "[Where] concern with arrest has not been 'chimerical,' . . . it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. *See, e.g., Epperson v. Arkansas,* 393 U.S. 97 (1968)."

At the same time, faithfulness to this approach insures that the litigation is not "hypothetical or abstract . . . academic or moot . . . [but rather] definite and concrete touching the legal relations of parties having adverse interests." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-241 (1937). The plaintiff who sincerely wishes to exercise his rights, but rationally perceives that by doing so he undergoes a genuine risk of arrest or prosecution, fairly understands that failure to prevail means that he must either abandon prospective conduct which implicates values important to him or proceed at peril to his liberty. The stakes at issue in his litigation are manifest; the controversy is palpable.

3. The Court's Decisions Applied to the Facts of this Case.

Appellees have presented a controversy which is at least as substantial as those presented by the plaintiffs in *Linmark, Epperson, Doe* and *Craig,* and is significantly different from those presented by the plaintiffs in *Younger, Steffel* and *Ellis.* The AERA, for example, was, by strong implication at least, targeted at appellee UFW. When enacted, the Union had been aggressively organizing farm workers in Arizona for more than five years. Except for the rival International Brotherhood of Teamsters, no other union was active in the fields.

Inevitably, then, the AERA governs the conduct of the UFW in Arizona. This comprehensive law, by design and by its express provisions, covers all aspects of farm labor organizing in the State. The thirteen sections of the Act which the Union challenged in its amended complaint specifically control the work in which it has previously and typically engaged.[4]

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[4]See, e.g.—
§23-1385(B)(7)—prohibitions and restraints on primary boycott speech activities directed to retailers;
§23-1385(B)(8)—prohibitions and restraints on consumer directed speech;
§23-1385(B)(11)—collective bargaining prohibitions and restraints;
§23-1385(B)(12)—prohibitions and restraints on picketing, boycotting or threats thereof;

More particularly, provisions of the AERA which the three-judge court discussed outlaw or enfeeble organizing activities which have been routinely regarded as integral to the UFW's existence. Section 23-1389 of the Act, for instance, defines the exclusive procedures by which the UFW may organize and represent workers for collective bargaining purposes. As alleged, and as substantiated by the court's factual findings,[5] the section operates to preclude the majority of workers of a particular employer from electing bargaining representatives of its choice. It effectively limits the number of workers which a union may organize and excludes from a union's voting ranks peak harvest workers—predictably, those laborers with the greatest stake in a union's efforts. The UFW therefore possesses a sturdy interest in countering elections conducted pursuant to § 23-1389, and in securing recognition through other procedures.[6]

The success of a union in a closely-waged struggle against an employer often depends upon consumer support. Section 23-1385(B)(8) restricts the content of publicity which a union and its supporters may communicate. It denies unions such as the UFW their accustomed use of publicity, and thus impairs campaign efforts in a serious and direct fashion.

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§23-1385(B)(13)—ban on strike by minorities;
§23-1390—temporary restraining orders without notice;
§23-1392—criminal penalties;
§23-1382(2)—definition of employer;
§23-1382(6)—definition of labor dispute;
§23-1385(C)—denial of access;
§23-1389—representational election;
§23-1384—rights of employer; and
§23-1385(D)—collective bargaining restrictions.

[5]449 F.Supp., at 455-457; Appendix, pp. 470-476. See also the testimony of witnesses Cesar Chavez (Appendix, pp. 292-408), and Stanley Lubin (Appendix, pp. 408-447).

[6]Appellees such as Ruben Alaniz and Matilda Verela, farm workers, possess equivalent interests. It is of course their rights to organize and to choose a union, even as peak harvest workers, which are forfeited by the Act.

Union organizing is essentially futile if organizers are deprived of meaningful access to workers. There exists slight hope of enlisting members where organizers are not afforded appropriate opportunity to communicate the benefits of unionizing to potential members. Section 23-1385(C) permits employers who seek to resist the UFW to restrain access to their employees. It thereby curtails union activities which have been historically perceived as central to the performance of its official duties.

Finally, union demands are often realized when they are coupled with the threat or the implementation of a strike or boycott. Section 23-1393(B) furnishes an employer who is the subject of a UFW strike or boycott with a statutory weapon to enjoin such efforts unilaterally.

To the UFW,[7] therefore, prosecution under any of the above provisions of the AERA is not an imagined fear. To endure it must participate in elections, consumer campaigns, organizing drives and strikes. Constitutional or not, the sections at issue adversely bear upon the constitutionally protected activities of the UFW in Arizona. They are proscriptions which the UFW—like the agent in *Linmark,* the teacher in *Epperson,* the doctor in *Doe,* and the vendor in *Craig*—would reasonably and necessarily desire to test in order to fulfill its professional responsibilities.

Moreover, here, unlike the circumstances in any of the above cases, the possibility of prosecution is enlarged because of the interest of a specific and powerful class in the statute's enforcement. The intervention below of appellants Arizona Farm Bureau Federation, Arizona Grape Growers' Association, Vegetable Growers' Association and Yuma Citrus Shippers' Association persuasively testifies that these growers' associations will press hard for execution of the AERA's provisions. In their "Motion and Application to Intervene as Defendants,"

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[7]As a plaintiff the UFW represents its own interests, as well as those of its members. *Allee v. Medrano,* 416 U.S. 802, 813 n.13 (1974).

dated October 1, 1973, these associations stated that they had "assisted in the drafting of the Arizona Agricultural Employment Relations Act, testified on the need for legislation and provided important and valuable resource information to show why the Act was necessary to protect the public interest." (Paragraph IIIe.) Intervenors also characterized their relation to the AERA as follows (Paragraph IIIb):

> "Numerous protections are afforded those employers represented by the intervenor-applicants via this Agricultural Employment Relations Act. *These protections include in part, sanction against unfair labor practices, restrictions on strike and boycott activities, procedures for resolving issues of representations, and criminal sanctions in the Act which provide numerous and important protections for the members of the intervenor-applicants.* Inasmuch as this suit attempts to declare the . . . Act unconstitutional, this lawsuit has a direct and pecuniary effect upon the interest of the intervenor-applicants . . . ." (Emphasis supplied.)

In light of the growers' own perception of the significance of the Act to their own interests, and their sense of the importance of criminal sanctions to those interests, it would be inexcusably naive to expect that they would passively or ineffectually tolerate the statute's violation by the UFW.

Amici argue in Part III that the sections at bar are not so imprecise that the lower court should have abstained. However, conceptually, resolution of this issue is immaterial here. As developed above, the vice of failing to hear anticipatory challenges to criminal statutes is the deterring of arguably privileged conduct by those unwilling to risk arrest and prosecution. If, as amici contend, the law is clear, then the UFW's fears of criminal proceedings are well-taken; the Union must confront a genuine dilemma regarding the exercise of its constitutional rights.

But, even if the law were in fact vague, the UFW's fears would remain rational. So long as the UFW could reasonably interpret the statute to proscribe constitutionally protected

activity, it would reasonably perceive the identical dilemma. Further, even if the UFW believed the law did not control its conduct, it could reasonably presume that law enforcement personnel might entertain a contrary interpretation. *Baggett v. Bullitt,* 377 U.S. 360, 374 (1964); *Keyishian v. Board of Regents of New York,* 385 U.S. 589, 599 (1967). In either case, the foreseeable consequence would be the impairment of appropriate constitutionally protected activities.

4. Appellants' Arguments.

Appellants brush past the argument of amici as if it were an unwanted realization. At page 29 of their brief they state:

> "The lower court and the appellees also rely on *Doe v. Bolton,* 410 U.S. 179 (1973). . . . *Doe v. Bolton* involved a single statutory provision and not a comprehensive regulatory statute. In addition, absent a facial attack, the only way the provision at issue in *Doe v. Bolton* could have been challenged was by the deliberate commission of a criminal act. This is not true in this case."

Amici concede that the AERA is a comprehensive criminal statute and not a single provision. That result, though, is the product of a deliberate decision by the Arizona legislators and the growers' representatives who assisted in the drafting of the Act. While this decision manifestly multiplies the work of courts which must review the law, it does not revise the constitutional analysis. Broad or narrow, a criminal statute is a criminal statute. Article III, section 2 contains no size restrictions.

In addition, it is simply not true that, apart from actions such as this one, the UFW can challenge the law without deliberate commission of a criminal act. As just explained, section 23-1392 of the AERA subjects any person who violates "any provision" of the law to criminal prosecution.

The two decisions most strenuously urged by appellants, *A.F.L. v. Watson,* 327 U.S. 582 (1946), and *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945), do not fortify their position. *Watson* was an abstention case. Its holding relied upon *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941), a landmark abstention opinion. 327 U.S., at 598. On the subject of case or controversy, the Court in fact held that plaintiffs had established a cause of action in equity:

> "[T]he threat of irreparable injury is real not fanciful, immediate not remote. The crux of the matter is the allegation that there is an imminent threat to an entire system of collective bargaining, a threat which, if carried through, will have such repercussions on the relationship between capital and labor as to cause irreparable damage. We conclude for that reason that the bill states a cause of action in equity." 327 U.S., at 595.

See also *id.,* at 593-595.

As analyzed previously, the line which divides the doctrines of case or controversy and of abstention is a clear one. The former is constitutionally required, while the latter is judge-made and discretionary. Each advances different policies.

In *Lake Carriers' Assoc. v. MacMullan,* 406 U.S. 498 (1972), this Court illuminated those differences. At issue there was the Michigan Watercraft Pollution Act of 1970, which the State interpreted as prohibiting the discharge of sewage in Michigan waters and as requiring vessels with marine toilets to have sewage storage devices. Plaintiffs attacked the Act on a variety of constitutional and statutory grounds.

The three-judge court which first heard the case dismissed it for want of a justiciable controversy. 336 F.Supp. 248, 253. It concluded that any opinion reached on the merits would be purely "advisory." *Ibid.*

All members of this Court rejected the lower court's decision, finding that the requirements of Article III, section 2 had been satisfied. Justice Brennan explained:

> "Since, as appellees concede, the Michigan requirements on the discharge of sewage will be preempted when the federal standards become effective, the gist of appellants' grievance is that, according to Michigan authorities, they are required under Michigan law to install sewage storage devices that (1) may become unnecessary once federal standards, authorizing discharge of treated sewage, become applicable or (2) may, in any event, conflict with other state regulations, pending the promulgation and effective date of the federal standards. The immediacy and reality of appellants' concerns do not depend, contrary to what as the District Court may have considered, on the probability that federal standards will authorize discharge of treated sewage in Michigan waters or that other States will implement sewage control requirements inconsistent with those of Michigan. *They depend instead only on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices. For if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion.* See, e.g., *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945) (existing burden on interstate commerce justiciable controversy in absence of federal pre-emption or other conflicting state laws)." 406 U.S., at 506-507 (footnote omitted; emphasis supplied).

Significantly, though, the Court then proceeded to hold abstention proper. It found, as appellants argue here, that "the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" 406 U.S., at 510 (bracket in original). But, unlike appellants, the Court did not muddle doctrines; rather, it directed its argument to a precise conclusion concerning abstention, not case or controversy.

McAdory too has been regarded as an abstention decision. *See, e.g., Zwickler v. Koota,* 389 U.S. 241, 255-256 (1967) (Harlan, J., concurring). Moreover, claims that are crucial here to appellees' argument were not raised by the petitioners in *McAdory.*

Thus, while the UFW argues vigorously that there is a credible threat of prosecution, in *McAdory* the Court observed that "it nowhere appears that the statutory penalties are being . . . threatened or applied." 325 U.S., at 460. Indeed, petitoners' principal contention in *McAdory* was that violation of a challenged provision of the statute at issue could result in their being legally prevented from functioning as unions within Alabama. 325 U.S., at 458-459. The Court, however, found no suggestion within the law of such dire consequences. 325 U.S., at 459. Unlike appellees then, the petitioners in *McAdory* did not "assert or show" that the sanctions complained of otherwise "operate[d] as an injunction restraining freedom of speech or assembly." *Ibid.*

Finally, in *McAdory,* the petitioners represented persons against whom certain of the provisions challenged could not be applied, so as to raise the legal issue sought to be litigated. 325 U.S., at 464-467. Here, by contrast, appellees unquestionably represent the persons against whom sanctions would be sought. Standing to sue is not a problem.

5. **Section 23-1385: The Unfair Labor Practices Provision of the AERA.**

Section 23-1385(B) defines thirteen unfair labor practices in which it is unlawful for a union to engage. Appellees alleged in their amended complaint that five of these practices -- (B)(7), (B)(8), (B)(11), (B)(12), and (B)(13) — could not be constitutionally proscribed.

Amici's analysis demonstrating that the threat of imposition of criminal sanctions establishes a justiciable controversy applies with equal force to these constraints established by Section 23-1385(B). Pursuant to Section 23-1390, for example,

the Agricultural Employment Relations Board may enjoin persons from engaging in any unfair labor practice. Whether enforced by criminal penalties or administrative sanctions, the threat of application of the AERA to the appellees creates a live, Article III controversy. *See, e.g., California v. La Rue,* 409 U.S. 109, 112 n.3 (1972).

B. *The Agricultural Employment Relations Act Is A Broad Regulatory Scheme Which Has A Direct And Immediate Impact On The Appellees.*

1. **The Impact of the AERA upon Appellees.**

Section A establishes that the AERA's threat of sanctions satisfies the case or controversy requirement. In fact, however, even absent this threat this case does not offend Article III principles.

The AERA has already taken considerable toll upon appellees. Growers, employers and the Act-created Agricultural Employment Relations Board have enforced the statute's provisions against the UFW. Existence of the AERA has in and of itself impaired efforts of the Union and Arizona farm workers to organize.

Since passage of the AERA in 1972 eight separate suits have been brought under its provisions against the UFW and its members. The litigation has succeeded on several occasions in halting First Amendment activities such as handbilling and oral conversations. Three times temporary restraining orders were issued against protected expression of the UFW—*ex parte* and without notice to the UFW.

Even more specifically, provisions of the AERA which were held unconstitutional below have been invoked against the UFW. Safeway Stores, Inc., a prominent grocery chain, alleged violations of § 23-1385(B) in securing relief against the UFW's boycott of its stores in June 1973. Two months later, the Agricultural Employment Relations Board filed formal charges against the UFW for violation of § 23-1385(B)(6),

(7) and (8) for the same conduct. Significantly, in the period between these two actions a superior court had found unconstitutional the granting of the first injunction.

A section of a statute, of course, need not be pleaded against a party to register an impact. Testimony below revealed that, as the overall result of the AERA, UFW boycott activities have been markedly curtailed and obstructed. Members and supporters have pulled back from Union campaigns. The Union has suffered loss of both members and collective bargaining agreements which it possessed prior to the law's enactment. Employers who formerly expressed willingness to negotiate have backed off from talks. The relative wages and benefits of Arizona farm workers in comparison to farm workers across the country have worsened. Workers and labor organizations within the State petitioned for only seven elections within the first five years of the law; in neighboring California, workers and groups petitioned for nearly 400 elections within the first five months of the effective date of the California Agricultural Relations Act.

2. **The Applicable Case Law.**

For over a half a century this Court has held that a record such as the instant one creates a justiciable case or controversy. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), for instance, an Oregon corporation that ran private schools attacked a statute which required all children to attend public schools. The law was passed in 1922, the year of the suit, but was not to become effective until four years later. Nevertheless, the Court adjudicated the plaintiffs' claim since the legislation had already caused a decrease in student enrollment at the corporation's schools with a resulting loss of income. The "injury to appellees was present and very real—not a mere possibility in the remote future." 268 U.S., at 536.

Two years earlier the Court had found a case or controversy where a party brought a pre-enforcement action against a statute based upon a reasonable *assumption* as to

harm to be suffered. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). At issue there was a West Virginia statute which required oil producing companies within the State to supply domestic demands to the extent needed. Pennsylvania argued that the law would impermissibly interfere with its oil supply.

The suit was brought just a few days after the legislation was passed. "No order under it had been made by the public service commission, nor had it been tested in actual practice." 262 U.S., at 592. Nevertheless, the Court stated that the suit was properly brought:

> " [T]his [the timing of the litigation] does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." 262 U.S., at 593.
>
> "We regard it as entirely clear that the act is intended to compel the retention within the state of whatever gas may be required to meet the local needs for all purposes, and that its procedural, penal and remedial provisions are amply adequate to accomplish that result. And we think it equally clear from the allegations in the bills now established by the evidence, that the situation when the suits were brought was such that the act directly and immediately would work a large curtailment of the volume of gas moving into the complainant states. Indeed, the conclusion is unavoidable that with the increasing demand in West Virginia, and the decreasing production, the act in a few years would work a practical cessation of the interstate stream." *Id.,* at 594-595.

A similar decision was reached in *Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926), in which the Court examined a newly enacted ordinance passed by the Village of Euclid, Ohio,

establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses and other residences. An owner of a tract of land within Euclid challenged the ordinance under the Fourteenth Amendment. He charged that the entire ordinance unconstitutionally diminished the value of his property, and that prospective buyers were accordingly deterred from purchasing any part of the land.

The owner had made "no effort to obtain a building permit or apply to the zoning board of appeals for relief as [he] might have done under the terms of the ordinance". 272 U.S., at 386. Nevertheless, Justice Sutherland, citing *Pierce, supra,* 268 U.S., at 525, and *Terrace v. Thompson,* 263 U.S. 197, 215 (1923), held that a controversy had been stated:

> "Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear." *Ibid.*

See also *Currin v. Wallace,* 306 U.S. 1, 9 (1939); *Carter v. Carter Coal Co.,* 298 U.S. 238, 287 (1936); *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906).

The principle reflected in the above opinions was summarized and reaffirmed in *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). There, this Court held:

> "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect, *Pennsylvania v. West Virginia,* 262 U.S. 553, 592-593 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 536 (1925); *Carter v. Carter Coal Co.,* 298 U.S. 238, 287 (1936), 'One does not have to await the consummation of threatened injury to obtain preventive relief.' *Pennsylvania v. West Virginia, supra,* at 593." 419 U.S., at 143.

See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3532, at p. 254 (1975).

Complementing this principle is this Court's decision in *Jenkins v. McKeithen,* 395 U.S. 411 (1969). *Jenkins* was in part a standing case, so its holding is obviously limited accordingly. But this Court has recognized that standing and case or controversy as argued here share a common nexus: in *Warth v. Seldin,* 422 U.S. 490, 498 (1975), the Court stated that

> "in its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."

Standing opinions of this Court thus bear upon the instant issue because in reaching conclusions on standing the existence of a case or controversy necessarily must be determined by the Court.

In *Jenkins* the plaintiff, a labor union member, filed suit against a Louisiana statute which created a body called the Labor-Management Commission of Inquiry for the purpose of investigating and finding facts relating to alleged violations of state or federal criminal laws in the labor-management relations field. The Commission was empowered to conduct public hearings concerning such alleged violations; its specific powers included compelling the attendance of witnesses, requiring the production of records and issuing public findings as to whether there was probable cause to believe that criminal violations had occurred. Witnesses were not permitted to cross-examine other witnesses, or to call anyone to testify at the public hearings.

Jenkins challenged the statute on due process and equal protection grounds. He argued that the law denied witnesses "the right to effective assistance of counsel, the right to confrontation, and the right to compulsory process for the attendance of witnesses." 395 U.S., at 421. He did not allege that he was called to appear before the Commission, or that he expected to be called. *Ibid.*

The Court found Jenkins' cause proper for adjudication. Justice Marshall wrote:

> "[I]t is clear that appellant possesses sufficient adversary interest to insure proper presentation of issues facing the court. His allegations, if taken as true, indicate that the Commission and those acting in concert with it have carried out a series of public acts designed to injure him in various ways. Appellant's interest in his own reputation and in his economic well-being guarantee that the present proceeding will be an adversary one.
>
> "We also think that appellant has alleged that the Act's administration was the direct cause of sufficient injury to his own legally protected interests to accord him standing to challenge the validity of the Act. We are not presented with a cause in which any injury to appellant is merely a collateral consequence of the actions of an investigative body . . . . It is no answer that the commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him." 395 U.S., at 423-424 (citations omitted).

The *Pierce-Pennsylvania* series of decisions which were distilled in the *Regional Rail Reorganization Act Cases,* as buttressed by *Jenkins*, strongly supports appellees' argument here. The AERA has harmed appellees, and it continues to harm and to threaten to harm them. Its existence has hamstrung organizing efforts of the Union and of Arizona farm workers in general. Benefits of collective bargaining have been denied to or withdrawn from appellees as the direct and immediate result of the enactment of the AERA.

Moreover, this curtailment of union activity follows from the intent and the content of the law. No meaningful aspect of union organizing and representation is untouched by the AERA. As already discussed, elections, strikes, boycotts, bargaining, campaigns for worker and public support, and

access to laborers are all regulated by the law in a manner that is seriously adverse to union interests. And, as pointed out in the previous section, major growers' associations intervened in this action expressly to preserve these relative benefits which they had drafted and lobbied into law.

Like legislative interference with oil supply, a restrictive zoning plan, or a mandatory public school requirement, the statute at bar reflects an adjustment of interests between parties in competition. Whatever else, the AERA is not a neutral bill: one group—here, the growers and employers—has gained at the expense of another—the farm laborers and farm labor unions. More than in appellants' relied upon opinion of *Watson, supra,* 327 U.S., at 595, the challenged sections of the AERA significantly affect "the entire system of collective bargaining" within Arizona and create "repercussions on the relationship between capital and labor as to cause irreparable damage."

3. Appellants' Arguments.

Appellants' response to all this is to essentially overlook it. They give past enforcement of the statute no weight. Although the President of the UFW, Cesar Chavez, testified based upon experience as to past and prospective injury deriving from the law, appellants omitted scrutiny of this portion of the record. Testimony from respected and experienced experts in the labor area, which confirmed appellees' analysis of the AERA's impact, was dismissed as hopelessly speculative. Indeed, the thrust of appellants' efforts to circumvent the court's finding that from the "examples cited by plaintiff, and not controverted precisely by defendants, it must be concluded that this case is not hypothetical, abstract, or generalized,"[8] is to suggest that the three-judge court believed the wrong evidence. *See generally* Appellants' Brief, pp. 20-21.

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[8] 449 F.Supp., at 452; Appendix, p. 463.

The courts in the decisions cited above found case or controversy absent the quality of real injury evident here and without the benefit of thoughtful expert testimony as offered and accepted below. Their opinions, however, were grounded upon a realistic and sensitive appreciation of the workings of a regulatory statute—a mode of analysis which should not be abandoned here at the urging of appellants.

C. *The Appellees Have Presented An Overbreadth Controversy That Is Presently Both Real and Immediate.*

1. Introduction: Overbreadth, Justiciability and Case or Controversy.

Whether considered under the rubrics of justiciability and standing, or whether considered more narrowly as an issue of case or controversy, this Court has repeatedly given broad hearing to cases which raise meaningful First Amendment overbreadth questions. The rationale for this approach is the "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

The balancing of judicial values which is implicit in the overbreadth doctrine follows from appreciation of our larger system of values. As stated in the frequently-cited examination of this Court's development of the doctrine:

> "The overbreadth doctrine is quite clearly outside the pantheon of 'passive virtues.' Rather than serving to postpone and limit the scope of judicial review, it asks that review be hastened and broadened . . . .
>
> "In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme." Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L.Rev. 844, 852 (1970).[9]

[9]Hereinafter this note will be referred to as *Overbreadth Note.*

The "judicial prediction or assumption" which is referred to in *Broadrick* and the basis for "departure" identified in the *Overbreadth Note* are grounded upon a fundamental understanding of human nature and a constitutional ambition for an ordered society. Again, the *Overbreadth Note, supra* at 854, is instructive:

> "A second function of the chilling effect rationale [for the overbreadth doctrine] is to answer directly the argument that courts should not seek to cure statutory overbreadth until a claimant who is himself privileged has pursued normal channels of review. The answer is that persons contemplating privileged action which collides with a law may be discouraged from testing the constitutional issue, though their claim to immunity would presumably be vindicated if they proceeded in the teeth of the statute, and were set upon by the state. Operating against a bold assertion of rights are respect for legality, uncertainty that one's claim of privilege will be held to prevail, consequent fear of statutory penalties and general unwillingness to bear the burdens of litigations."

The overbreadth doctrine thus exacts certain costs. Even beyond concerns of judicial economy, it may work to free convicted persons whose own protected conduct was not burdened by the challenged statute. *See, e.g., Kunz v. New York* 340 U.S. 290 (1951). *See also Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Terminiello v. Chicago,* 337 U.S. 1 (1949); *Thornhill v. Alabama,* 310 U.S. 88, 96-98 (1940). Where the statute is vague also, it may result in invalidating a law which conceivably might never be applied against protected conduct. See *Baggett, supra,* 377 U.S., at 374; *Keyishian, supra,* 385 U.S., at 599. In either case, it requires a court to pass upon the application of a statute to conduct which is not before it, and which may bear no connection to the past, present, or future activities of the party adjudicating the claim.

As demonstrated below, the constitutional values involved in the instant case justify use of the overbreadth doctrine without imposing the more serious costs which application typically requires. Overbreadth problems spill out of the AERA from every major section which implicates expressive rights. Further, these problems are not abstract to appellees; at present, they strait-jacket the activities of the UFW and the workers which it seeks to represent. See *Zwickler, supra,* 389 U.S. 241; *Overbreadth Note, supra,* at 864 ("Of course, at some point a suit for anticipatory relief may become so abstract that it cannot be said to arise 'in the context of a specific live grievance.' The overbreadth claimant must show some personal interest in the litigation for his suit to go forward. But an overbreadth claim involves a complex of assertions which, if correct, uniquely justify accelerated judicial review."). *See also* Radcliffe, The Case or Controversy Provision 126 (1978).

2. **The Overbreadth Doctrine Applied to this Case.**

The test of overbreadth varies depending upon the First Amendment interests implicated. "[W]here conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick, supra,* 413 U.S., at 615.

The overbreadth of certain sections of the AERA challenged by the UFW is both real and substantial. Indeed, appellees are not concerned with a rare or relatively insignificant application of each section, but rather complain of the most probable application as it in fact affects their rights of expression and association.

In their amended complaint, for example, appellees alleged that Section 23-1385(B)(8) of the Act was overbroad on its face. See Appendix, pp. 30-31. The three-judge court agreed with this claim and held the section unconstitutional on the grounds raised.[10]

[10]449 F.Supp., at 462; Appendix, p. 490.

Section 1385(B)(8) unequivocally prohibits inducing or encouraging an ultimate consumer to refrain from purchasing particular agricultural products "by the use of dishonest, untruthful and deceptive publicity." Appellees charged that while perhaps a statute could legislate against malicious or intentional misrepresentations,[11] Section 23-1385(B)(8) goes much too far, significantly burdening both the UFW's ability to communicate with consumers in typical consumer boycott campaigns and the concomitant ability of the public to obtain information about labor disputes involving the UFW. The attack upon this section then is not the result of creative manipulation of a statute so that "some persons' arguably protected conduct . . . be caught or chilled. . . ." *Broadrick, supra,* 413 U.S., at 618.[12]

Appellees similarly alleged, and the district court similarly held, that the AERA's provisions on access by union representatives to farm laborers were an overbroad infringement on the UFW's rights.[13] Section 23-1385(C) permits employers to refuse to furnish unions "material, information, time, or facilities . . . to communicate with employees of the employer." Appellees conceded that the rights of expression and association must yield appropriately to reasonable restrictions on time, place and manner, but asserted that this section does not establish a constitutional accommodation of the competing interests. They claimed that especially where many migrant agricultural employees live on the employer's facilities during non-work periods, as the court specifically found below,[14] § 1385(C)'s encroachment into constitutionally protected activities directly and manifestly affects unions such as the UFW.[15]

[11]See Part IV for detailed legal analysis of this section.

[12]On its face, Section 23-1385(B)(8) affects pure speech activities such as oral communications and handbilling. Thus, it is arguable whether the "real and substantial" test even applies to this section. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 520 (1972); *Cohen v. California,* 403 U.S. 15 (1971).

[13]See Appendix, pp. 34-35; 449 F.Supp., at 465, Appendix, p. 496.

[14]449 F.Supp., at 456; Appendix, p. 474.

[15]See Part V for detailed legal analysis of this section.

In response to paragraph 14G of appellees' amended complaint,[16] the court made explicit findings of fact that Arizona workers could not organize or join a union without pursuing the election procedures of the AERA, and that typically "the entire [election] process cannot take place before the majority of the employees [of a particular employer] finish their work and leave their place of employment."[17] Parallel to the approach taken with the sections previously discussed, the appellees acknowledged that both the manner by which union representation is achieved and the conduct of elections are proper subjects for legislation, despite the fact that each area of concern is deeply imbued with First Amendment values. They argued, however, that § 23-1389 is impermissibly overbroad: the reality of the Arizona agricultural industry means that operation of this section effectively deprives the UFW of a meaningful right to associate and represent the majority of farm workers of any particular employer and deprives appellee Alaniz and other farm workers of their right to associate effectively.

Section 23-1393(B) permits an employer to enjoin unilaterally a union strike or boycott upon appropriate application. The private party whose interests are most adverse to the union may thus restrain classic privileged conduct through the exercise of essentially standardless discretionary power.[18] In fact, the quality of overbreadth which appellees associate with this section is so egregious that case or controversy is satisfied without more analysis. As stated by Justice White in *Broadrick, supra,* 413 U.S., at 612-613:

> "Facial overbreadth claims have also been entertained . . . where [expressive or communicative] conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First

[16]See Appendix, pp. 32-33.

[17]449 F.Supp., at 457; Appendix, p. 475.

[18]See Appendix, p. 32.

> Amendment rights. See *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969); *Cox v. Louisiana,* 379 U.S. 536, 553-558 (1965); *Kunz v. New York,* 340 U.S. 290 (1951); *Lovell v. Griffin,* 303 U.S. 444 (1938)."

Here, as noted in appellees' complaint, the individual who can invoke this discretion is not a disinterested official, but rather is the interested party who benefits most from suppression of constitutional activities.

Other provisions of the AERA which were challenged by the UFW, but not addressed by the court, also present weighty problems of overbreadth. Section 23-1385(B)(7) prevents union representatives or supporters from communicating with, encouraging or even attempting to persuade retailers or management personnel regarding a decision whether to handle the product of a struck employer. As interpreted repeatedly by the Board, the section also forbids peaceful handbilling and oral conversations directed at soliciting consumer requests to store personnel to stop handling a product. See Appendix, pp. 85-87; *cf. Broadrick, supra,* 413 U.S., at 618; *Law Students Research Council v. Wadmond,* 401 U.S. 154, 162-163 (1971).

Appellees alleged[19] and proceeded to argue that §23-1385 (B)(7) thus does not properly distinguish between expression which is peaceful, non-coercive and civil, and expression which is violent or coercive. They claimed that the section is overbroad because it prohibits peaceful union communication with those persons within the public with the greatest interest in information regarding a labor dispute.

Section 23-1385(B)(12) proscribes a non-certified union from any picketing and boycotting, or from threatening to engage in either, if union recognition is the object of the expression, where another union has been recognized by the employer, where an election has occurred within the preceding twelve months, or where a petition has been filed. Appellees

[19]See Appendix, pp. 30-31.

asserted that this section too constitutes an overbroad ban on First Amendment communication[20] and pointed by comparison to its carefully tailored counterpart within the National Labor Relations Act, 29 U.S.C §158(b)(7)(c). That latter section contains the following qualifying language of constitutional significance:

> "*Provided further* that nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick, deliver or transport any good or not to perform any services."

Unlike the plaintiffs in *Broadrick,* then, the appellees here have complained of overbreadth which is both real and substantial judged in relation to the AERA's legitimate sweep. The challenged statute in *Broadrick,* §818 of Oklahoma's Merit System of Personnel Administration Act, sought principally to bar meaningful partisan political activities by state employees. Only at the fringes of the Act could one argue that certain allegedly protected activities such as the wearing of political buttons or the use of bumper stickers were impermissibly impaired.

By contrast, the privileged conduct banned by the AERA swallows up the conduct which constitutionally may be prohibited. Each section of the AERA which is contested by the UFW as overbroad forbids activity which is found at the core of the Union's professional activity. The law would proscribe nothing if it did not proscribe this activity; candidly, it is principally what the statute is getting at. See *Hynes v. Mayor of Oradell,* 425 U.S. 610 (1976).

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[20]See Appendix, pp. 30-31.

Accordingly, the instant case could not be more concrete. Broadrick and his two companions complained of overbreadth applications that were far removed from the focus of the statute; and they themselves had engaged in conduct squarely within the statute's legitimate coverage. Appellees, on the other hand, have attacked a law that specifically affects their privileged conduct by virtue of its most common, albeit illegitimate application. More than the parties in cases such as *Kunz* and *Aptheker,* appellees have presented to this Court an overbreadth controversy that is presently both real and immediate.[21]

III. THE THREE-JUDGE DISTRICT COURT PROPERLY REFUSED TO ABSTAIN FROM DECIDING THE SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS RAISED BY THE CLEAR LANGUAGE OF THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS ACT

The three-judge district court held that it was not required to defer deciding the important constitutional issues presented by this case until those questions had been passed upon by the Arizona state courts. (Appendix at 460; 449 F.Supp., at 451.) That holding is clearly supported by the decisions of this Court articulating the doctrine of abstention and applying that doctrine to cases involving fundamental First Amendment rights.

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[21]Appellants argue at pages 36-37 that, as a matter of constitutional principle, "neither . . . the extent of the overreach [of a statute] as an absolute matter, nor the comparison between the statute's overreach into protected activity and its applicability to prohibitable activity can be measured in the abstract." They therefore claim that the absence of a record dooms appellees' overbreadth arguments.

This facile proposition runs counter to every First Amendment overbreadth case ever decided. Indeed, this case is exceptional because the claimants complain of overbreadth which in fact implicates their accustomed conduct. As discussed previously, the essence of the overbreadth doctrine is the protection it affords to parties and conduct that are not before the court.

A. *Abstention Is Proper Only In Narrowly Limited, Special Circumstances.*

Last Term the Supreme Court reaffirmed its uniform holdings that individuals seeking relief under 42 U.S.C. §1983 need not present their federal constitutional claims in state court before coming to a federal forum. *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978). In addition, the Court reemphasized that there is no doctrine requiring abstention simply because resolution of a federal question may result in the overturning of a state policy. *Ibid.*

The Court has frequently explained that abstention is a judge-made doctrine, which vests *discretion* in the district court to decline to exercise or postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. *E.g., Harman v. Forssenius,* 380 U.S. 528, 534 (1965).[22] Such postponement of the obligation to resolve constitutional issues is appropriate, however, only in "narrowly limited, 'special circumstances' justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' *England v. Medical Examiners,* 375 U.S. 411, 418 (1964)." *Kusper v. Pontikes,* 414 U.S. 51, 54 (1973). *Accord, Zwickler v. Koota,* 389 U.S. 241, 248-249 (1967).

Thus, abstention is proper only where it can be "fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication." *Kusper v. Pontikes, supra,* at 55. If the state statute in question, although never interpreted by the state courts, is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," it is the duty of the district court to exercise its jurisdiction and decide the federal constitutional

[22]The Court has consistently held that it is better practice in a case in which abstention is proper for the court to *retain* jurisdiction pending resolution of the state law issues in state court, rather than simply to dismiss the case. *E.g., Zwickler v. Koota,* 389 U.S. 241, 244 n.4 (1967); *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 512-13 (1972).

issues presented. *Baggett v. Bullitt,* 377 U.S. 360, 375-79 (1963); *Harman v. Forssenius, supra,* at 535. *See also Zwickler v. Koota, supra,* at 251 n.14 ("[A]bstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction.").

The Court forcefully illustrated the point that abstention is not required unless the proposed limiting construction is "fair" and "reasonable" in *Procunier v. Martinez,* 416 U.S. 396 (1974). The appellees in *Martinez* had filed a class action on behalf of themselves and all other inmates under the jurisdiction of the California Department of Corrections to challenge, *inter alia,* the constitutionality of administrative regulations relating to censorship of prisoner mail. In both the district court and the Supreme Court the appellants argued that the federal courts should abstain from deciding this issue. Appellants noted that a state statute assured prisoners the right to receive books, magazines and periodicals. Appellants then argued that the interpretation of that statute by the state courts and its application to the regulations governing prisoner mail might avoid or modify the federal constitutional questions presented. 416 U.S., at 402.

The Supreme Court rejected that argument for abstention on the ground that the appellants' suggested interpretation was simply not reasonable:

> "[W]e think it is plain that no reasonable interpretation of § 2600(4) would avoid or modify the federal constitutional question decided below." *Id.,* at 404.

These principles mandating caution in application of the abstention doctrine have particular significance in cases such as the one at bar involving First Amendment questions. *See, e.g., Procunier v. Martinez, supra,* at 404 ("[W]e are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."). As explained by Justice Brennan for the Court in *Zwickler v.*

Koota, to require the plaintiff in a First Amendment case to suffer the delay of state court proceedings "might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S., at 252. See *Baggett v. Bullitt, supra,* at 378-79.

The appellants' argument for overturning the three-judge court's decision on abstention falls short of satisfying these exacting standards. Simply put, the provisions of the AERA held unconstitutional are neither uncertain nor fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. Accordingly, the three-judge district court's refusal to order abstention was proper.

B. *Appellants Have Failed To Demonstrate The Existence Of "Special Circumstances" That Would Make An Order Of Abstention Proper.*

The appellants' entire legal argument consists of recitation of two general principles and the string citation of seven cases. (Appellants' Brief, at p. 43 & nn.31-32.)[23] The two principles are themselves unobjectionable: (1) statutes should be construed when possible to uphold their validity; and (2) it is the proper function of state courts, rather than federal courts, to construe state statutes. Yet simply stated in the abstract, those principles do not assist in the resolution of the instant case. Determining whether or not to abstain requires an exercise of discretion based on a careful analysis of the circumstances of the particular case before the Court:

[23]In the section of their brief dealing with case or controversy, the appellants cite two additional abstention cases: *A.F.L. v. Watson,* 327 U.S. 582 (1946) and *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945). However, the appellants disregard the established rule that application of the abstention doctrine requires a careful, case-by-case analysis, *e.g., Baggett v. Bullitt,* 377 U.S. 360, 375 (1969), and make no effort to apply the general principles of abstention involved in those cases to the particular circumstances of appellees' challenge to the constitutionality of the AERA.

> "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exists the 'special circumstances' prerequisite to its application must be made on a case-by-case basis." *Baggett v. Bullitt, supra,* 377 U.S., at 375 (citations omitted).

The appellants have not engaged in the required careful analysis. Instead, they have advanced three broad arguments to support their contention that the district court should have abstained: First, the appellants contend that several of the provisions held unconstitutional by the district court are uncertain and could have been construed so as to avoid the constitutional defects found by the court. Second, they contend that, even though the provisions of the statute are unambiguous, the court should have abstained in order to permit the state courts to save the AERA by imposing procedural and substantive safeguards not found on the face of the statute. Third, the appellants appear to suggest that abstention was proper simply to allow the state courts to have the first opportunity to rule on the appellees' federal claims. As we will demonstrate, none of these arguments has any merit.

1. None of the Provisions Held Unconstitutional Is Fairly Subject To A Limiting Construction.[24]

The appellants' argument for abstention suffers from a fundamental misunderstanding of the doctrine. As explained by this Court in *Procunier v. Martinez,* the federal courts are not required to create ambiguities in clear statutory language in order to manufacture state law issues that will permit deferring

[24]In view of the appellees' challenge to several, different provisions of the AERA, abstention cannot be viewed as an "all or nothing" doctrine. Amici, of course, believe that abstention is not necessary to permit the state courts to resolve any of the purported state law issues raised by the appellants. However, were this Court to agree with the appellants with respect to one or more of those issues, the district court's decision not to abstain as to the other provisions of the AERA, unaffected by state law questions, should be affirmed.

decisions on federal constitutional questions. Nor are they required to adopt unreasonable interpretations of state law to avoid reaching those federal constitutional issues. *Procunier v. Martinez, supra,* at 404; *Zwickler v. Koota, supra,* at 248-49. Yet in urging that abstention was required in the instant case, the appellants are necessarily arguing that the district court should have been willing to go to such extreme lengths in order to avoid reaching the constitutional questions presented by the clear language of the AERA.

The appellants argue that five specific provisions of the AERA are ambiguous. We will show that none of the cited provisions is uncertain. In addition, interpretation of several of the provisions relied upon by appellants was not necessary to the district court's constitutional holdings.

a. *The Definitions of "Permanent" And "Temporary" Agricultural Employees Are Not Uncertain.*

The definitions of both "permanent" and "temporary" agricultural employees in the AERA require employment "during the preceding calendar year." A.R.S. § 23-1382(1).[25] The district court held that the practical effect of this provision, coupled with the AERA's restriction of the right to vote to employees falling within the definition of a permanent or

[25]Section 23-1382(1) provides in part:

"In this article, unless the context otherwise requires:

"1. 'Agricultural employee, permanent' means any employee over sixteen years of age who has been employed by a particular agricultural employer *for at least six months during the preceding calendar year,* engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. 'Agricultural employee, temporary' means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed *during the preceding calendar year,* engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field." (Emphasis added.)

temporary agricultural employee, was that a particular worker must be employed during two successive harvests before being entitled to vote. (Appendix at 484; 449 F.Supp., at 460.)

In view of the migratory and transitory nature of agricultural employment, the district court found that the categories of employees eligible to vote set forth in the AERA preclude a significant number of employees from selecting bargaining representatives of their own choosing and thus from meaningful participation in the collective bargaining process. (Appendix at 484-85; 449 F.Supp., at 406.) That finding, in turn, formed part of the factual basis for the district court's legal conclusion that the AERA's provisions for employee representation, recognition and election procedures are unconstitutional. (See Appendix at 471-87; 449 F.Supp., at 455-461.)

Although the appellants argue in their brief that the district court adopted the view of this definitional provision that would invalidate the statute (Appellants' Brief, at pp. 38-39), they do not suggest any other interpretation of the statutory language.[26] Instead, they merely note that the section has not yet been interpreted or applied by the state courts or the Agricultural Employment Relations Board. The fact that a statute has not been judicially or administratively construed, however, does not require abstention. *See, e.g., Chicago v. Atchinson, T. &*

[26]The appellants have now apparently abandoned the argument, advanced in their Jurisdictional Statement, that "preceding calendar year" should be interpreted to mean the preceding 365 days, rather than the preceding period from January 1 through December 31. (Jurisdictional Statement, at pp. 20-21.) The suggestion that "preceding calendar year" could be so interpreted is plainly inconsistent with the clear language of the AERA. When the Arizona Legislature wanted to say "preceding twelve months," it knew how to do so. See, *e.g.,* A.R.S. § 23-1385(B)(12)(b), defining prohibited unfair labor practices to include certain picketing "[w]here *within the preceding twelve months* a valid election under § 23-1389 has been conducted." (emphasis added); A.R.S. § 23-1382(2), defining "agricultural employer" as one who employs six or more agricultural employees for a period of thirty days "during the preceding six month period." See also Cohen & Rose, *State Regulation of Agricultural Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 Law & Soc.O. 313, 325.

S.F. Ry., 357 U.S. 77, 84 (1958) (no dispute as to intent and meaning of new city ordinance); *Doud v. Hodge*, 350 U.S. 485, 487 (1956) (holding it improper to dismiss a prayer for an injunction against enforcement of a state statute "simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute"). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts And The Federal System 991-92 (2d ed. 1973). The definitions of "permanent" and "temporary" agricultural employees are clear and unambiguous. Abstention was not required to permit their interpretation by the state courts.

b. *The Meaning of the AERA's Access Provisions Is Not Uncertain.*

Section 23-1385(C) of the AERA provides that an employer may refuse to make available "materials, information, time, or facilities" to enable a labor organization to communicate with his employees.[27] The district court held that under this provision an employer of migrant farm workers need not provide a time or place for the union to communicate with his workers and that an employer therefore need not allow the union to come upon his property. (Appendix at 493; 449 F.Supp., at 464.) In view of the evidence establishing that the vast majority of farm workers reside in labor camps on property owned by the employer, such an absolute restriction on access to workers was held to constitute an "unconstitutional restriction on the First Amendment exercise of free speech because of private property interests." (*Ibid.*)

[27]The final sentence of Section 23-1385(C) provides:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities, to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters or adherents."

The appellants argue that the district court erred in its interpretation of § 23-1385(C). They contend that "[f]acilities does not mean real property." Rather, facilities "means those items that might be used to facilitate communications, such as microphones, platforms, chairs, etc." (Appellants' Brief, at 41.) Accordingly, in their view the section does not mean that an employer may deny access to his property in all cases. (*Ibid.*)

The difficulty with the appellants' proposed interpretation of "facilities" is that it totally ignores the language of Section 23-1385(C), which refers to "materials, information, time, *or* facilities." What appellants describe as "facilities" are in normal English "materials." Accordingly, the term "facilities" must have some additional, significant meaning. *See, e.g., Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975) ("It is axiomatic that all parts of an Act 'if at all possible, are to be given effect.'"). *Accord, Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 633 (1973); *Arizona v. Superior Court*, 113 Ariz. 248, 249, 550 P.2d 626 (1976) ("The law will be given, whenever possible, such an effect that no clause, sentence or word is rendered superfluous, contradictory or insignificant.").

The intended meaning of "facilities" becomes clear when the language of the section is read together as intended by the Legislature, rather than in isolation as done by the appellants. An employer need not provide materials—for example, chairs and microphones—or information—for example, addresses and telephone numbers of his employees. In addition, he need not furnish "time or facilities" to permit a union to speak to his employees. In context, this use of "facilities" can only mean "place" or "location." And if a grower need not provide a time or place for the union to communicate to his employees, it is equally clear, as found by the district court, that he need not permit the union to come upon his property. (Appendix at 493; 449 F.Supp., at 464. See also Rose, *State Regulation of*

Agricultural Labor Relations—The Arizona Farm Labor Law—A Constitutional Analysis, 1973 Law & Soc.O. 373, 392-93.) In short, Section 23-1385(C) is not "fairly susceptible" of the type of limiting interpretation suggested by the appellants.

c. *There Is No Uncertainty As to the Ability of the Agricultural Employment Relations Board to Issue Bargaining Orders.*

As part of the factual findings that formed the basis for holding the AERA's election provisions unconstitutional, the district court observed that the AERA prohibits the Agricultural Employment Relations Board from issuing an order requiring an employer to bargain with a union unless that union is certified through an election. (Appendix at 475; 449 F.Supp., at 457.) That observation was based on the language of § 23-1389, which provides that an exclusive bargaining representative shall be "selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes," and of § 23-1385(A)(5), which provides that an agricultural employer shall not be required to bargain collectively "until a representative of his agricultural employees has been determined by means of a valid secret election."[28]

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[28]Section 23-1385(A)(5) provides:

"It shall be an unfair labor practice for an agricultural employer:

". . . .

"5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 23-1389. Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election."

Section 23-1389(A) provides in part:

"A. Representatives selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in a unit appropriate for such purposes shall be the exclusive representative of all the agricultural employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. . . ."

In contrast to the clear language of the AERA restricting the growers' duty to bargain to representatives selected through a valid secret ballot election, Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 of this title." Section 9(a) of the Act, 29 U.S.C. § 159(a), in turn, provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees of a unit appropriate for such purposes shall be the exclusive representatives of all the employees. . . ." (Emphasis added.)

Thus, unlike the roughly analogous provisions of the AERA, neither § 9(a) nor § 8(a)(5) specifies how the bargaining representative is to be chosen. That legislative determination not to specify the manner in which the representative was to be selected served as the basis for this Court's holding that under the NLRA an employer's duty to bargain is not restricted solely to unions whose representative status is certified after an NLRB election, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 600 (1969), and for its further holding that the NLRB could issue a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed unfair labor practices that have made the holding of a fair election unlikely or that have in fact undermined a union's majority and caused an election to be set aside. *Id.,* at 610-16.

The appellants do not argue that the language of the AERA limiting the growers' duty to bargain to *elected* representatives is uncertain. Nor do they explain how the clear language of the AERA could be reasonably construed to authorize issuance of a bargaining order concerning a non-elected union representative. The appellants simply assert that they "disagree" that the AERA precludes issuance of bargaining orders absent a valid election.

Such a disagreement is an insufficient basis for an order of abstention. Again, while it is true that the state courts have not interpreted the AERA on this point, the fact that a statute has not been judicially or administratively construed does not require abstention. *E.g., Chicago v. Atchison, T. & S.F. Ry, supra; Doud v. Hodge, supra.*

Moreover, even were the AERA unclear as to the authority of the Board to issue a bargaining order in the absence of an election, the district court's finding on this point was not a part of its constitutional decision. The district court invalidated the AERA's provisions for selecting bargaining representatives because of the excessive delays possible under those procedures, coupled with the seasonal nature of agricultural labor. (Appendix at 482; 449 F.Supp., at 459.) The inability of the Agricultural Employment Relations Board to issue bargaining orders was cited *only* to illustrate that an employer had little incentive not to maximize the delay possible under other provisions of the AERA. (Appendix at 475, 486; 449 F.Supp., at 457, 461.) The inability to issue bargaining orders absent a secret election was not itself held invalid.

d. *Application of the Twenty-Day Notice Period of the Arizona Administrative Procedure Act to the AERA Did Not Require Resolution of Uncertain Questions of State Law.*

The three-judge court found, based on the evidence presented at trial, that the election procedures of the AERA are virtually identical to those of the National Labor Relations Act which, in a contested election, require six to seven weeks for completion. (Appendix at 474; 449 F. Supp., at 456.) The court also found that the six to seven week period between the filing of a petition for an election and the holding of an election will be longer than the periods of peak employment during the harvest season for many Arizona crops. The court further found that when this period is added to the three to six weeks of

work that must be done before a petition can be filed, the entire process cannot take place before the majority of employees finish their work and leave their place of employment. (Appendix at 474-75; 449 F. Supp., at 457.) This final factual finding served as the basis for the district court's legal conclusion that the AERA's provisions for selecting bargaining representatives were unconstitutional. (Appendix at 482; 449 F. Supp., at 459.)

One minor aspect of the factual findings related to delay concerned the time between the filing of an election petition and the holding of the required pre-election hearing. The AERA provides no time period for how soon the Board must act. The AERA's only provision on this point states that the Board "shall provide for an appropriate hearing *upon due notice.*" Section 23-1387(C) (emphasis added).

The district court found as a factual matter that under NLRB experience such a pre-election hearing is not held until from fourteen to twenty-one days after the petition is filed. (Appendix at 474; 449 F. Supp., at 457.) The court further found that the same amount of time would be required under the AERA procedure. The court noted that since the AERA did not set a specific time period for holding the hearing, the general provisions of the Arizona Administrative Procedure Act, establishing a 20-day notice period before holding a contested hearing, would apply.

There is no merit to the appellants' argument that this "interpretation" of the interaction of the AERA and the Arizona Administrative Procedure Act involved resolution of an uncertain issue of state law. The district court's analysis of the applicability of the Arizona Administrative Procedure Act was straightforward and reasonable. That Act provides generally that in a contested case all parties shall be afforded an opportunity for hearing after reasonable notice. "Unless

otherwise provided by law, the notice shall be given at least twenty days prior to the date set forth for hearing." A.R.S. § 41-1009. The AERA does not "otherwise provide." It simply calls for "due notice." Thus, the district court held applicable the general provisions of Arizona law defining what notice should be given in such situations—that is, twenty days notice.

The appellants have cited absolutely no authority to indicate that the district court erred in its analysis of the applicability of the Arizona Administrative Procedure Act. They simply argue that the requirement of "due notice," without more, supersedes the generally applicable, specific provisions of the Arizona Administrative Procedure Act requiring twenty days notice. In the absence of any authority, it cannot be said that the AERA is "fairly susceptible" of that interpretation. See *Procunier v. Martinez, supra,* at 404.

More importantly, quite apart from its statement concerning the twenty-day notice period of the Arizona Administrative Procedure Act, the district court found as a *factual* matter that pre-election hearings take between two and three weeks under the comparable NLRB procedures.[29] Thus, any legal issue concerning the applicability of the Arizona Administrative Procedure Act is irrelevant to the decision of the constitutional question raised by delays in the AERA election procedures. Abstention is proper only if there is an uncertain issue of state law *and* resolution of that issue will permit the district court to avoid deciding a constitutional issue. *E.g., Baggett v. Bullitt, supra,* 377 U.S., at 375-379. The question

[29]In a moment of startling candor, the appellants reveal that their real concern in this case is not with the manner in which the district court interpreted state law, but with the way in which it evaluated the evidence presented to it. See Appellants' Brief, at p. 21 ("The court adopts the view of the evidence that in its opinion rendered the statute unconstitutional."). The appellants, however, have not directly raised any factual question on this appeal.

raised by appellants concerning the Arizona Administrative Procedure Act simply has no bearing whatsoever on the federal claims involved in the appellees' lawsuit.

e. *The Meaning of the AERA's Compulsory Arbitration Provisions Is Not Uncertain.*

Section 23-1393(B) of the AERA establishes a scheme of compulsory arbitration that can be invoked only by the growers. The section confers jurisdiction upon the state courts to issue a ten-day restraining order to enjoin a strike or boycott upon application of an agricultural employer. As a condition for the order the employer must agree to submit the issues to binding arbitration; if the parties within two days after the issuance of the restraining order cannot agree upon an arbitrator, "the court shall appoint one to decide the unresolved issues."[30]

The district court found that by its clear language Section 23-1393(B) permits an employer, without the consent of the union, to submit a labor dispute to binding arbitration by an outsider. (Appendix at 498; 449 F.Supp., at 466.) The court held that such unilateral compulsory arbitration denies unions due process since the provision has the impermissible effect of coercing parties to submit to arbitration without their agreement or consent. (*Ibid.*)

[30]Section 23-1393(B) provides:

"In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues . . . ."

The appellants now argue that the language of Section 23-1393(B) is uncertain and that the district court misinterpreted it.[31] Section 23-1393(B), they argue, only requires an employer to agree to arbitration. The union, they contend, can either accept or reject the employer's "offer" to arbitrate.

The appellants' suggested interpretation ignores the clear language of the statute. Section 23-1393(B) nowhere grants to a union the right to refuse arbitration posited by the appellants. Section 23-1393(B) does not require an employer to agree to arbitration *if* the union also agrees. It simply states that the employer must submit the dispute to binding arbitration. Similarly, the court is not authorized to appoint an arbitrator *if* the union agrees to arbitration but is unable to agree with the grower as to an arbitrator. Section 23-1393(B) provides simply and clearly that two days after issuance of a restraining order, if the parties have not agreed to an arbitrator, the court shall appoint one. No element of union consent to any aspect of the arbitration procedure is either expressed or implied by Section 23-1393(B). The compulsory arbitration provision simply is not fairly subject to an interpretation that renders unnecessary the district court's constitutional decision. See *Procunier v. Martinez, supra,* at 404.[32]

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[31]At the time they filed their Jurisdictional Statement, the appellants apparently did not believe the language of § 23-1393(B) was unclear. For although they vehemently argued that the district court erred in holding the section unconstitutional (Jurisdictional Statement, at 39-41), they nowhere suggested its language was unclear or that it had been misinterpreted by the district court. (*See id.,* at 19-24.)

[32]The decision on the constitutionality of the compulsory arbitration provision was wholly separate from the court's holdings on the AERA election procedures, the AERA access provisions and the unfair labor practice provision prohibiting certain publicity directed at the ultimate consumer of agricultural products. As noted at the outset of this section, the propriety of the district court's refusal to order abstention must be evaluated separately with respect to each of these distinct provisions of the AERA.

2. Abstention Should Not Be Ordered To Permit the State Courts to Salvage an Unambiguous Statute.

Section 23-1385(B)(8) makes it an unfair labor practice for a union or its agents "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by use of dishonest, untruthful and deceptive publicity." The district court held that this section was unconstitutional on its face since it prohibited speech simply because it was not truthful, without requiring any showing of intent or malice on the part of the speaker. Truthfulness, the court held, cannot be made a prerequisite to First Amendment protection. (Appendix at 489; 449 F.Supp., at 462, citing, *inter alia, Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) and *New York Times v. Sullivan,* 376 U.S. 254 (1964).)

The appellants candidly acknowledge that Section 23-1385(B)(8), on its face, does not provide any of the procedural or substantive safeguards required for a valid prohibition on certain types of speech activity. (See Appellants' Brief, at 40.) Nevertheless, the appellants urge that abstention should have been ordered to permit the Arizona state courts to graft on to the unambiguous language of the statute those safeguards mandated by *New York Times v. Sullivan.* This Court considered and rejected an identical argument for abstention in *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).[33]

The statute involved in *Constantineau* provided that designated persons could forbid the sale or gift of liquor to one who by excessive drinking produces described conditions or exhibited specified traits, such as becoming dangerous to the peace of the community. The chief of police of Hartford, without notice or hearing to Ms. Constantineau, caused to be posted a notice in

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[33]While explaining and arguably limiting its *Constantineau* decision in *Paul v. Davis,* 424 U.S. 693 (1976), the Court did not question or modify in any way that portion of its holding concerning the abstention doctrine.

all retail liquor outlets in Hartford that sales or gifts of liquors to Ms. Constantineau were forbidden for a year. 400 U.S., at 434-35.

The district court held that procedural due process required that an individual, such as Ms. Constantineau, must be given notice of the intent to post her name and an opportunity to present her side of the matter. This Court affirmed the district court's due process holding. *Id.*, at 435-37.

In dissent Justice Black argued that the district court should have abstained to permit the Supreme Court of Wisconsin to limit the posting law by reading into it the type of procedural safeguards the Court held were required by due process. *Id.*, at 444 (Black, J., dissenting). Responding to that argument, the Court flatly rejected the proposed extension of the abstention doctrine to include challenges to unambiguous state statutes even though the state courts might impose limiting constructions to avoid federal constitutional problems:

> "In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler v. Koota*, 389 U.S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. *Id.*, at 250-251. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it." *Id.*, at 439. (Footnote omitted.)

Accord, Procunier v. Martinez, supra, 416 U.S., at 400-401 ("The mere possibility that a state court might declare the prison regulations unconstitutional is no ground for abstention."); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 47 U.S.L.W. 4017, 4018 n.3 (U.S., Dec. 5, 1978) ("Abstention may appropriately be denied, where, as here, there is no ambiguity in the challenged state statute.").

The reasoning of *Constantineau* applies with equal force in the instant case. The naked question, uncomplicated by an unresolved issue of state law, is whether Section 23-1385(B)(8) on its face is unconstitutional. The appellees, therefore, should not be required to present their federal constitutional claim to the state courts.

C. *An Abstention Order Would Be Improper In View Of The Delay Already Suffered By Appellees In The Vindication Of Their Federal Rights.*

In the preceding sections amici have demonstrated that the provisions of the AERA held unconstitutional are neither uncertain nor fairly susceptible of a reading that would avoid the necessity of constitutional adjudication. Even were there uncertain issues of state law, however, abstention would be inappropriate in view of the delays already suffered by appellees and the significance of the constitutional claims they are advancing in this lawsuit.

This Court has repeatedly emphasized that significant delays are inherent in the abstention process, and that abstention thus increases the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court. *E.g., Harris County Commissioners Court v. Moore,* 420 U.S. 77, 83 (1975). Accordingly, where the litigation has already been long delayed, it has held that abstention should not be required. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); see *Procunier v. Martinez, supra,* 416 U.S., at 404. *Accord, Bellotti v. Baird,* 428 U.S. 132, 150 (1976) ("This Court has remarked that the equitable practice

of abstention is limited by considerations of ' "the delay and expense to which application of the abstention doctrine inevitably gives rise." ' ").

In *Hostetter* the Court affirmed the district court's refusal to order abstention, emphasizing that the doctrine of abstention was equitable in origin, vesting discretion in the courts:

> "[E]ven though constitutional issues be involved, 'reference to the state courts for construction of the statute should not automatically be made.' *NAACP v. Bennett,* 360 U.S. 471." 377 U.S., at 328-29.

The Court then held it was a proper exercise of that discretion to refuse to abstain based on the fact that "the litigation has already been long delayed." *Id.,* at 329.

Similarly, in *Procunier v. Martinez,* after rejecting the appellants' suggested interpretation of state law as unreasonable, the Court reinforced its decision not to order abstention by noting the "high cost" of abstention created by the delays inherent in that procedure:

> "Moreover, we are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment." 416 U.S., at 404.

The same concerns for the dangers of delay found in *Hostetter* and *Martinez* require affirmance of the district court's refusal to abstain in the instant case. As in *Martinez,* the federal constitutional challenge in the case at bar involves facial repugnance to the First Amendment. And as in *Hostetter,* the appellees here have been forced to suffer extended delays in their efforts to vindicate their federal rights.

The instant lawsuit was filed more than six years ago. (Appendix at 1, complaint filed on August 14, 1972.) During much of that time, the AERA was enforced; and the appellees, its members and supporters suffered a denial of important First Amendment rights. (*See generally* Appendix at 79-91.) If abstention is ordered, substantial additional delays can be

expected; for Arizona does not have any certification procedure to permit the expeditious resolution of uncertain issues of state law. *Cf. Bellotti v. Baird, supra,* 428 U.S., at 150-151 (availability of certification procedure greatly simplifies abstention analysis). The "long delay" that concerned the Court in *Hostetter,* by comparison, was approximately *four* years.

The problem of delay is intensified by the fact that a number of the appellees' challenges to provisions of the AERA were not reached by the district court because of its holding that the entire Act was invalid. As to several of those provisions, there can be absolutely no suggestion that construction of the statutory language is necessary to clarify ambiguities.

Accordingly, even were the Court to accept all of appellants' arguments concerning abstention, the district court would nonetheless be required to adjudicate a number of appellees' constitutional claims. An order of abstention under those circumstances would simply increase the costs of litigation and delay ultimate resolution of important constitutional issues without advancing any significant policy of comity or federalism. Indeed, such a piecemeal approach to this lawsuit would frustrate entirely Arizona's efforts to have a comprehensive, coherent policy governing farm labor relations in the state.

D. *Appellees Are Entitled To A Federal Forum In Which To Vindicate Their Federal Rights.*

A careful analysis of the appellants' argument for abstention reveals that the district court's constitutional decisions did not depend upon the resolution of any unclear state law issues. There simply are no ambiguous provisions of the AERA that can be fairly construed so as to avoid deciding appellees' federal claims.

At bottom, the appellants' argument for abstention is based on a belief that the state courts should have the first opportunity to pass upon substantial challenges to a state statute embodying important state policies. As understandable as this desire might be from the State's perspective, abstention

under these circumstances would negate the entire history of the enlargement of the jurisdiction of the federal district courts. *Wisconsin v. Constantineau, supra,* 400 U.S., at 439. As explained in *Zwicker v. Koota,* by giving the district courts original jurisdiction of actions to redress the deprivation under color of state law of any right secured by the Constitution, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. 389 U.S., at 247-48:

> "[A]bstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. . . . '[W]e would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.' For the 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.'" *Id.,* at 251-52 (citations and footnotes omitted).

An identical solicitude for plaintiff's choice of a federal forum to hear his constitutional claims was voiced in *Mitchum v. Foster,* 407 U.S. 225 (1972), in which this Court unanimously held that 42 U.S.C. §1983 constituted an "expressly authorized" exception to the anti-injunction statute, 28 U.S.C. § 2283. The Court noted that the legislative history of Section 1983 made it clear that Congress understood it was altering the relationship between the States and the Nation with respect to the protection of federally created rights:

> "The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor

> of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.,* at 238-39 (footnotes and citations omitted).

The three-judge district court properly discharged its duty in the instant case. There are no unresolved questions of state law affecting the appellees' claims. Accordingly, the court was obligated to decide the important issues of federal constitutional law presented by the clear language of the AERA.

IV. SECTION 23-1385(B)(8) OF THE AGRICULTURAL EMPLOYMENT RELATIONS ACT IMPERMISSIBLY RESTRICTS THE SPEECH OF PARTICIPANTS IN LABOR DISPUTES

This Court has long recognized that full discussion concerning the nature and causes of labor disputes is indispensable to the effective and intelligent uses of modern government. Accordingly, communications relating to labor disputes have been found to be at the core of speech protected under the First Amendment. *E.g., Thornhill v. Alabama,* 310 U.S. 88 (1940); *American Federation of Labor v. Swing,* 312 U.S. 321 (1941). As such, debate on issues arising from labor disputes should be "uninhibited, robust, and wide-open." *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964).

This constitutionally mandated public policy of encouraging free and full discussion on all issues underlying labor disputes stands in marked contrast to Section 23-1385(B)(8) of the AERA, which makes criminal any "untruthful" speech by labor organizations or their agents directed to consumers of agricultural products without requiring any showing that the speaker knew or should have known that the contents of his

communications were "untruthful."[34] The First Amendment, of course, protects far more than purely "true" speech. *See, e.g., New York Times v. Sullivan, supra; Organization For A Better Austin v. Keefe,* 402 U.S. 415 (1971). Accordingly, the three-judge district court properly held that § 23-1385(B)(8) constitutes an impermissible restriction on protected speech. In addition, § 23-1385(B)(8) authorizes imposition of a prior restraint without satisfying the "heavy burden" required for such a restriction on speech activity to be justified. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). For this reason, as well, the three-judge court was justified in holding § 23-1385(B)(8) facially invalid under the First Amendment.

A. *The Speech of Parties To A Labor Dispute Is Fully Protected By The First Amendment.*

It is, of course, axiomatic that the protections of the First Amendment extend to advocacy of beliefs and opinions concerning all matters of public concern. *E.g., Thomas v. Collins,* 323 U.S. 516, 531 (1945) ("The rights of free speech and free press are not confined to any field of human interest"). *See also Miller v. California,* 413 U.S. 15 (1973) (the First Amendment protects works of literary, artistic, political or scientific value). Indeed, purely commercial speech of an entirely private nature has been held to be within the ambit of

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[34]Section 23-1385(B)(8) makes it an unfair labor practice for any labor organization or its agents

> "To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

In addition, § 23-1392, which applies to a violation of *any* provision of the AERA, makes it a misdemeanor to engage in the conduct proscribed by § 23-1385(B)(8).

the First Amendment. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). Communications concerning labor problems and union organization, however, have long been held to be at the very core of First Amendment protection because of their direct relationship to the functioning of our governmental processes.

The importance of safeguarding speech concerning employees' rights and union organization was forcefully articulated by the Court in *Thornhill v. Alabama,* in which a state ban on peaceful picketing was invalidated on the express grounds that information concerning labor disputes was fully protected by the First Amendment:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues rasied by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in Senn's Case (301 US at 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' " 310 U.S., at 102-103.

An identical concern for the importance of unfettered discussion of all issues involved in labor disputes is evident in the Court's decision in *American Federation of Labor v. Swing, supra.* The Court there considered the constitutionality of a state injunction prohibiting "peaceful persuasion" in the

absence of a proximate relationship of employees and employer between the parties to a labor dispute. As in *Thornhill,* the Court struck down the state restriction on labor speech as "inconsistent with the guaranty of freedom of speech." 312 U.S., at 325. See also *Staub v. Baxley,* 355 U.S. 313 (1958) (conviction under municipal permit ordinance of union organizer engaged in soliciting employees to join union reversed).

B. *By Permitting Only "Truthful" Speech, Section 23-1385(B)(8) Impermissibly Limits Appellees' Speech Rights.*

The appellants do not seriously dispute that on its face Section 23-1385(B)(8) prohibits a wide-range of constitutionally protected speech. Rather, their argument is that the section is not invalid on its face because there are some applications of its prohibitions against "untruthful" speech that might be constitutionally permissible. *See, e.g.,* Appellants' Brief, at 61 ("it [was] error to hold that under no circumstances could a prohibition against falsehood in a labor setting be sustained"); *id.,* at 62 ("[*NLRB v. Gissel Packing Co.*] clearly rejects the district court's holding that any application of A.R.S. section 1385 B 8 would be unconstitutional.").[35]

The appellants' defense of § 23-1385(B)(8) suffers from a fundamental misunderstanding of facial overbreadth. The question before the Court is not, as appellants would have it, is there any possible conduct within the reach of the statute that

[35]The appellants' reliance on *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), is entirely misplaced. In *Gissel* the Court held that, although an employer has First Amendment rights to communicate his views to his employees, those rights cannot outweigh the equal rights of employees to associate freely. Any balancing of those rights, the Court then held, must take into account the economic dependence of the employees on their employers, and the necessary tendency of employees to pick up subtle, but nonetheless intended, implications of threats of reprisals by the employer. Concern for *employer* coercion, mixed with otherwise permissible communication of views, is no justification for limiting the speech rights of *unions* and their members. Section 23-1385(B)(8) operates only against labor organizations and their agents, *not* employers.

constitutionally may be prohibited. Rather, as discussed in detail in Section II, above, the question that must be answered is whether, on its face, the statute prohibits some significant, constitutionally protected activity. If it does, the statute must be invalidated. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 520 (1972); *Coates v. City of Cincinnati,* 402 U.S. 611, 614-16 (1971). Indeed, in the typical overbreadth case, the conduct of the party challenging the statute *is* properly regulated by the State. Nonetheless, the litigant can challenge the facial validity of the statute on the grounds that the protected conduct of others, not before the court, is also restricted by the statute:

> "[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attacks demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).

At most, the plaintiff pursuing a facial attack must demonstrate not that the overbreadth of the challenged statute is "complete," but only that it is both "real" and "substantial" when judged in relation to the statute's plainly legitimate scope. *Id.,* at 615. Measured against this standard, it is readily apparent that § 23-1385(B)(8) is unconstitutional on its face.

1. Truthfulness Is Not A Prerequisite To First Amendment Protection.

Section 23-1385(B)(8) purports to impose a test of truthfulness on the legality under state law of otherwise constitutionally protected speech. Such a test has been unequivocally rejected by this Court. *New York Times v. Sullivan, supra; Organization For A Better Austin v. Keefe, supra.*

In *Sullivan* the Court canvassed authorities ranging from its own prior decisions in *Speiser v. Randall,* 357 U.S. 513 (1958), and *NAACP v. Button,* 371 U.S. 415 (1963), through the writings of Madison and John Stuart Mill, and concluded that truthfulness cannot be made a prerequisite to First Amendment protection:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'" 376 U.S., at 271 (citations omitted).

The Court then held that "erroneous statement is inevitable in free debate" and, accordingly, held that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (*Ibid.*)

By the time the issue of prohibiting "untruthful" speech was before the Court in *Organization For A Better Austin,* the Court considered it "elementary" that no test for truth was constitutionally permissible:

> "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication." 402 U.S., at 48.

The Court in *New York Times v. Sullivan* explained that simply permitting a speaker to defend himself by proving the truth of his statements would lead to an intolerable decree of self-censorship. 376 U.S., at 278-79. What is constitutionally required, the Court held, is a defense for "erroneous statements honestly made." *Id.,* at 278. Accordingly, to provide the breathing space necessary to promote free, uninhibited debate on public issues, the Court held that the State may impose sanctions only if the questioned statement is made with "actual malice"—that is, with knowledge that it was false or with regardless disregard of whether it was false or not. *Id.,* at 279-80. *Accord, Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967) (constitutional protections for speech and press preclude application of New York statute to allow recovery for false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth); *Vanasco v. Schwartz,* 401 F.Supp. 87 (S.D.N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976)(New York statute and campaign regulations prohibiting misrepresentations unconstitutional because showing of "actual malice" not required).[36]

2. Section 23-1385(B)(8) Impermissibly Restricts "Untruthful" Speech Without Requiring A Showing of "Actual Malice."

Section 23-1385(B)(8) purports to prohibit all speech intended to encourage ultimate consumers from purchasing agricultural products that is "dishonest, untruthful and deceptive." The section thus imposes absolute liability for false statements. There is no opportunity to defend against either criminal charges or administrative sanctions by showing that

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[36]Although *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), held that "actual malice" need not be proved to impose liability in defamation cases involving only private individuals and private issues, this Court has not authorized departure from the *New York Times* standard in any case involving public issues. Moreover, even in wholly private cases, the Court has emphasized that the States may not, as Arizona purports to do with § 23-1385(B)(8), impose "liability without fault" for false statements. *Gertz, supra,* 418 U.S., at 347.

the erroneous statement was honestly made. The State need not prove that the statement was knowing false or that it was made with reckless disregard for the truth. Accordingly, the section was properly held unconstitutional under *New York Times* and its progeny.

The appellants do not directly challenge the three-judge court's constitutional conclusion. Rather, they contend the court erred because it could have abstained to permit the Arizona state courts to read the necessary protections into the face of the statute. In addition, they question the propriety of the court's holding because of the alleged similarity between § 23-1385(B)(8) and certain provisions of the National Labor Relations Act (NLRA).

Appellants' arguments for abstention were fully considered and shown to be without merit in Section III of this brief. Their argument that § 23-1385(B)(8) is constitutional because of similarities to provisions of the NLRA is equally specious.

The relationship of the NLRA to the authority of a State to sanction false speech in labor disputes was expressly considered by this Court in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966). The Court there held that a civil action for libel under state law may be maintained consistently with the protections contained in the NLRA only if the plaintiff pleads and proves that the defamatory statements were published with knowledge of their falsity or with reckless disregard of whether they were true or false. *Id.,* at 65. Imposition of the protections enunciated in *New York Times v. Sullivan* was held to be necessary to guard against "unwarranted intrusion upon free discussion envisioned by the Act." *Ibid.*

Indeed, although the Court stated that it was adopting the *New York Times* "actual malice" standards in *Linn* "by analogy, rather than under constitutional compulsion," the Court's decision was explicitly motivated by constitutional considerations. Such considerations, the Court held, "weigh heavy here":

> "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Id.,* at 62-63.

The *Linn* Court expressed particular concern that a rule permitting any greater restrictions on speech than those authorized in *New York Times v. Sullivan* would unduly interfere with the spirited and often heated debate ordinarily found in labor disputes:

> "[T]he language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Id.,* at 58.

Protection of such robust exchanges of views, the Court stated, was implicit in both constitutional policy and those policies embodied in our federal labor laws. *Id.,* at 62-63. *See also Letter Carriers v. Austin,* 418 U.S. 264 (1974) (federal labor law preempts state law to the extent the State seeks to make actionable defamatory statements in labor disputes published without "actual malice").

In arguing that the policy underlying the NLRA somehow supports the constitutionality of § 23-1385(B)(8), not only do the appellants totally ignore the express holding to the contrary in *Linn,* but also they misstate the language of the Act. The appellants assert that the proviso to § 8(b)(4) of the NLRA, 29 U.S.C. §158(b)(4), authorizes "truthful publicity." They then contend that "[t]here is no practical difference—certainly none of constitutional dimension—between authorizing the truthful and prohibiting the untruthful." (Appellants' Brief, at

59.) The flaw in appellants' linguistic analysis is that they have misquoted the proviso: what is authorized is not simply "truthful publicity," but all publicity "*for the purpose of truthfully advising the public . . . .*"[37]

Unlike § 23-1835(B)(8), the proviso to Section 8(b)(4) incorporates an "intent" requirement. To be sure, the language chosen by the drafters of the proviso differs from that used by the Court several years later in *New York Times v. Sullivan.* But the proviso nonetheless anticipates that a union organizer must be able to defend his erroneous statements on the ground they were honestly made—that is, they were made for the purpose of truthfully informing the public.[38]

In sum, Section 23-1385(B)(8) is directed to the speech of participants in labor disputes—speech recognized by this Court to be of significant public interest. To be consistent with the Constitution—and to be consistent with our federal labor policy—such speech, even if false, can be restricted only if the speaker acted with "actual malice" as defined by this Court in *New York Times v. Sullivan.*

C. *Section 23-1385(B)(8) Is An Invalid Prior Restraint.*

The Agricultural Employment Relations Board, established under the AERA, is authorized by that Act to "prevent" unfair labor practices by issuance of cease and desist orders, § 23-1390(C), and to petition the State courts for enforcement

[37]The appellants' facile discussion of the meaning of the publicity proviso to § 8(b)(4) wholly fails to analyze its relationship to the explicit, prohibitory language of § 8(b)(4) itself, see *NLRB v. Local 760, Fruit and Vegetable Packers (Tree Fruits),* 377 U.S. 58, 63-72 (1964), or to consider this Court's well-established principle of construing the NLRA to prohibit peaceful, speech-related activity for particular ends only when "there is the clearest indication in the legislative history that Congress intended to do so." *Id.,* at 62.

[38]The appellants' citation to *NLRB v. Local 760, Fruit and Vegetable Packers (Tree Fruits),* 377 U.S. 58 (1964), is simply inapposite. The Court in *Tree Fruits* considered only the extent to which peaceful secondary picketing, which is outside the proviso to Section 8(b)(4), is nonetheless lawful under the NLRA. No issue of restricting "untruthful" speech was considered.

of such orders and for any "appropriate temporary relief or restraining order." § 23-1390(E). The AERA thus clearly contemplates use of judicial and administrative orders to prevent the occurrence of speech activity prohibited by § 23-1385(B)(8). The three-judge court, therefore, properly applied cases involving the validity of prior restraints in its constitutional analysis of this section. (449 F.Supp., at 463; Appendix at 490-91.)[39]

Prior restraints are not unconstitutional per se. Nevertheless, this Court has often stated that any system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). It is the party seeking to justify the prior restraint—here the appellants—that "carries a heavy burden of showing justification for the imposition of such a restraint." *Organization For A Better Austin v. Keefe, supra,* 402 U.S., at 419.

In all but the most extreme situations the Court will refuse to restrain speech before the fact, finding that whatever the countervailing interests may be, they are adequately served by criminal penalties or civil damage remedies imposed after freedom to speak has actually been so abused that its immunity is breached. *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 180-81 (1968); *Near v. Minnesota,* 283 U.S. 697, 716 (1931).

The nature of this heavy burden of justification carried by prior restraints was described in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), in which the Court held that

[39]The appellants do not disagree that application of Section 23-1385(B)(8) can involve a prior restraint on speech, although they offer the additional information that the speech activity there labeled an unfair labor practice can be dealt with by imposition of sanctions for past conduct, as well as by issuance of an injunction against future conduct. See Appellants Brief, at pp.60-61. Nevertheless, the appellants assert that the section does not raise any issue of prior restraint on its face because not *all* possible applications of the statute are prior restraints. The appellants' argument in this regard is supported by neither precedent nor logic.

municipal authorities had abridged the First Amendment rights of a theatrical promoter by denying him access to a municipal facility for the showing of the rock musical "Hair":

> "The presumption against prior restraints is heavier—and the degree of protection broader—than against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.*, at 558-59.

The standard for imposing a prior restraint is thus most demanding. Before criminal penalties may be imposed on non-obscene speech, it must be proved that the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam). And to justify imposition of a prior restraint an even greater showing of need is required. *Southeastern Promotions, Ltd. v. Conrad, supra.*

The threatened publication by the New York Times and the Washington Post of the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" failed to meet this heavy burden notwithstanding claims by the United States that such publication would work serious damage to the national security. *See New York Times v. United States,* 403 U.S. 713 (1971). The threatened injury caused by the speech activity proscribed by §23-1385(B)(8) similarly fails to meet that heavy burden.

In fact, before this Court the appellants offer no justification whatsoever for the authorization of prior restraints under § 23-1385(B)(8). Certainly, the availability of prior restraints is not required to prevent "publication of the sailing dates of

transports or the number and location of troops" during a time of war or national emergency. *Cf. Near v. Minnesota, supra,* 283 U.S., at 716. Nor is it likely that riots or other violence will be incited if § 23-1385(B)(8) prior restraints are unavailable. *Cf. Carroll v. Commissioners of Princess Anne, supra,* at 180. Indeed, it is not reasonable to posit any public injury that will occur if prior restraints are unavailable to enforce § 23-1385(B)(8). The State and the growers simply seek a method of restraining appellees' speech on issues of public interest solely to safeguard private, economic interests. *Cf.* 449 F. Supp., at 463; Appendix at 491.

However effective an injunction might be in preventing such private injury from occurring, our overwhelming, constitutionally-based commitment to free speech prevents use of a prior restraint to accomplish such a result:

> "Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." *Whitney v. California,* 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring).

See also *American Federation of Labor v. Swing, supra,* 312 U.S., at 325 (relying in part upon *United States v. Caroline Products,* 304 U.S. 144, 152 n.4 (1937) to invalidate state injunction against peaceful picketing).

Section 23-1385(B)(8) authorizes imposition of a prior restraint without adequate justification. Quite apart from that section's overbroad restriction on "untruthful" consumer publicity, therefore, it was properly held to be facially invalid under the First Amendment.

D. *Appellants Have Not Challenged The Three-Judge Court's Alternative Basis For Invalidating Section 23-1385(B)(8).*

The three-judge district court's holding that § 23-1385(B)(8) violates the First Amendment rests on two distinct and independent grounds. First, as discussed in the preceding subsections of this brief, the court held that the proscription of "untruthful" speech, without additional safeguards for the speaker, was unconstitutional. Second, the court held that § 23-1385(B)(8)'s limitation on consumer picketing by the union solely to situations in which the union has a "primary dispute" with a particular grower impermissibly restricts the right of nonemployees to communicate. (449 F. Supp., at 463; Appendix at 491-92).

The invalidity of such a narrow restriction on permissible picketing, the court held, was directly controlled by this Court's decision in *American Federation of Labor v. Swing, supra,* 312 U.S. 321 (1941). In *Swing,* the Illinois Supreme Court had enjoined picketing by a union on the ground that there was no dispute between the employer and his immediate employees. This Court reversed, holding that the injunction was inconsistent with the First Amendment. The lower court in the case at bar held that, if a primary dispute cannot constitutionally be required for primary picketing to be lawful, it cannot be made a requirement for lawful secondary picketing since the same "right to free discussion" is abridged. Accordingly, on this second, independent ground the three-judge court held that § 23-1385(B)(8) is invalid on its face as violative of the First Amendment.

The appellants have *not* challenged this portion of the three-judge court's decision. With respect to Section 23-1385(B)(8), the Jurisdictional Statement raises only the question whether invalidation of the section based on its prohibition of "untruthful" consumer publicity was correct. (Jurisdictional Statement, at p.3.) No question is presented concerning the court's decision insofar as it was based on the "primary dispute" requirement of that section. *(Ibid.)* Nor is that issue "fairly comprised" within the appellants' statement of questions presented. That issue, therefore, is not now properly before this Court. Rule 15 (c), Rules of the Supreme Court of the United States; *see Phillips Chemical Co. v. Dumas School Dist.,* 361 U.S. 376, 386 n.12 (1960).[40] Accordingly the three-judge court's holding that §23-1385(B)(8) is unconstitutional must stand.

V. SECTION 23-1385(C) OF THE AGRICULTURAL EMPLOYMENT RELATIONS ACT UNCONSTITUTIONALLY IMPAIRS THE RIGHT OF ACCESS BETWEEN FARM WORKERS AND UNION ORGANIZERS

A. *Summary of Argument: The AERA Access Provision Impermissibly Restricts Protected Speech.*

The Arizona Agricultural Employment Relations Act authorizes employers to deny union organizers access to farm labor camps.[41] The three-judge district court in the present case recognized that AERA § 23-1385(C) would inevitably have this result:

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[40]The appellants' brief on the merits also omits any discussion of this alternative, wholly independent basis for invalidating Section 23-1385(B)(8).

[41]The relevant provision reads as follows:

"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents."

Ariz. Rev. Stat. Ann. § 23-1385(C).

> "This provision clearly states that an employer of migrant farm workers does not have to provide a time or place when and where the union can communicate with its workers, and it also means that the employer does not have to allow the union to come upon his property. The provision provides a positive tool for a grower employer to keep any one and everyone away from his property." 449 F.Supp., at 464; Appendix, at p. 493.

Based on the unambiguous language of the statute, the court rejected appellants' proposals to reinterpret the provision to apply only to non-employee union organizers, to permit sufficient communication outside of work time and areas, or to distinguish "furnishing facilities" from "granting access." *Id.*, at 464-465; Appendix, at pp. 495-496.

The denial by the State of any right whatsoever to access to farm labor camps violates the First Amendment. Communications concerning labor problems and union organization have long been held to be included within the scope of the First Amendment. *See, e.g., Thomas v. Collins,* 323 U.S. 516, 534-537 (1945); *Hague v. CIO,* 307 U.S. 496 (1939). *See also* Section IV, *supra.*

Specifically, enactment of Section 23-1385(C) significantly involves the State with discrimination against the rights of speech and assembly. *See Reitman v. Mulkey,* 387 U.S. 369 (1967). It reflects a balancing of constitutional interests—the right of access versus private property rights—in which the former interest has been accorded no weight. Indeed, pursuant to Section 23-1385(C) growers are free to cut off access without regard to the opportunities and conditions that in fact exist on their land for organizers to communicate with workers. The law contains no constitutional escape hatch.

Deliberate or not, the section sidesteps the sort of constitutional case-by-case adjudication which typically characterizes controversies between respective parties who directly represent the above interests. *See, e.g., Lloyd v. Tanner,* 407 U.S. 551 (1972) (draft and war protesters vs. owners of a private shopping center); *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308 (1968) (union picketers vs. owners and tenant of private shopping center). It places the State squarely behind unbridled curtailment of expression, and thereby forecloses the opportunity for sensitive application or drafting of trespass laws.

The instant case thus raises no serious question of state action, because it is the State which is sanctioning and promoting the alleged constitutional injury. The only issue, therefore, is whether sufficiently compelling state interests exist to permit the State to silence protected speech in the manner provided by Section 23-1385(C).

However, even aside from this state involvement, Section 23-1385(C) works a constitutional deprivation given the peculiar nature of farm labor camps.

The three-judge court made a finding of fact that

> "[M]uch of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises." 449 F.Supp., at 456; Appendix, at p. 474.

Based upon this finding, it then concluded that "a labor camp [is] . . . a functional equivalent of a municipality" (449 F.Supp., at 464; Appendix, at p. 494), and held that reasonable access to such camps was protected under *Marsh v. Alabama,* 326 U.S. 501 (1946), and its progeny. Amici support this determination also.

B. *Application of Reitman v. Mulkey to the Instant Case Requires Invalidation of the AERA Access Provision.*

The present case is governed by this Court's holding in *Reitman, supra.* There, the Court examined two actions in which couples had sued apartment owners for racial dis-

crimination, in one case for refusal to rent an apartment and in the other case for eviction from their apartment. The owners in each matter defended their conduct by resort to Article I, Section 26 of the California Constitution, an initiative measure passed as Proposition 14 in a statewide ballot in 1964. The provision read:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." 387 U.S., at 371.

Proposition 14 thus "establishe[d] 'a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved.'" 387 U.S., at 374 (emphasis in original, quote from the decision below of the California Supreme Court). Justice White expanded:

> "Private discriminations in housing were now not only free from [previous California anti-discrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations, and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property." 387 U.S., at 377.

The Court agreed with the California court that the "provision would involve the State in private racial discriminations to an unconstitutional degree." 387 U.S., at 378-379. Citing *McCabe v. Atchison, Topeka and Santa Fe R. Co.,*

235 U.S. 151 (1914), *Nixon v. Condon,* 286 U.S. 73 (1932), *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), *Peterson v. City of Greenville,* 373 U.S. 244 (1963), *Lombard v. Louisiana,* 373 U.S. 267 (1963), and *Robinson v. Florida,* 378 U.S. 153 (1964), to "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations" (387 U.S., at 380), it thus held that the provision at issue

> "was intended to authorize, and does authorize racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discrimination. We have been presented with no persuasive considerations indicating that these judgments should be overturned." 387 U.S., at 381.

Like Proposition 14, Section 23-1385(C) "significantly encourage[s] and involve[s] the State in private discriminations." The right of a private employer to prohibit all union communication with workers "is now one of the basic policies of the State [of Arizona]."

The statute therefore bears no resemblance to a neutral and general criminal trespass statute which is designed to protect overall interests of private property and which has only an occasional impact on privileged activity. Rather, it is censorial in quality—a speech-directed and content-oriented law that singles out exclusively labor speech and expression as absolutely proscribable. And, to repeat, it is the State which backs this license for blanket proscription by lending and stimulating support for growers' denials of access to union organizers.

Moreover, Section 23-1385(C), again like Proposition 14, dramatically altered existing circumstances. Prior to its passage growers had to rely upon their "personal choice" in order to

discriminate against labor speech. Judicial enforcement of this choice depended upon careful scrutiny of the individual facts of each controversy. A right of access was recognized and given due consideration in relationship to countervailing interests of private property.

Now, not only is this right of access effectively eviscerated, but also it is destroyed absent a compelling state interest and by the establishment of a classic system of prior restraints. Pursuant to Section 23-1385(C), growers may bar access whenever they please, without regard to the extant conditions, and upon whatever terms they deem suitable. Therefore, even where the vast majority of an employer's workers live and work on his property, and where organizers have no alternative but to seek to reach the workers on that property, the State will countenance the complete denial of access. As noted, the law will not admit to any constitutional compromise; it is consequently wholly unsupportable.

At the same time, the State permits growers to check speech before it is ever uttered. Irrespective of content, the union organizer may be barred from the expression of his views. The statute cannot sustain the "heavy burden of showing justification for the enforcement of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

Significantly, appellants do not defend the Arizona legislature's balancing of values in Section 23-1385(C). Instead, they suggest that courts can enter a limiting construction on the power which the State confers to the private sector. See Appellants' Brief, at pp. 69-73. However, as just pointed out, the bare words of the statute permit no such judicial draftsmanship; like Propostion 14, this law cannot be rewritten to change what it plainly means. Application of an "as applied" approach would strip the section of all intended meaning and redefine it as a general trespass law—precisely the result sought to be avoided by its enactment.

C. *In Light of the Three-Judge Court's Findings of Fact, Marsh v. Alabama Requires Invalidation of The AERA Access Provision.*

Even minus the State's role here as promoter of the complained of constitutional wrong, Section 23-1385(C) works an impermissible constitutional deprivation to appellees. The law, in and of itself, is overbroad. Given the district court's amply supported finding of fact regarding the nature of farm labor camps, the statute prohibits too wide a scope of protected activity, involving freedom of association and speech.

1. Constitutional Basis for Access to Private Property Under the First and Fourteenth Amendments.

The Court in *Marsh v. Alabama, supra,* 326 U.S. 501, first considered the constitutional tension between the rights of access and private property. There, it overturned a criminal trespass conviction of a Jehovah's Witness for distribution of religious literature within Chickasaw, Alabama, a private company town. The town's corporate owner had previously posted notices throughout the community which warned of prosecution for any solicitation.

Justice Black refused to distinguish Chickasaw from public municipalities. He observed that Marsh's act would have been privileged in such municipalities, and found no compelling rationale to reach a different result for a similar community that was privately operated. The Court thus held that town ownership could not forfeit the constitutional rights of its residents:

> "These people, just as residents of municipalities, are free citizens of their state and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties

guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." 326 U.S., at 508.

Central to *Marsh,* therefore, is the principle that isolating conditions of employment which realistically result from workers being compelled to live and work upon their employer's property cannot be exploited by the employer so as to deny those workers access to otherwise privileged communications. Stated differently, no private interest can be permitted to so thoroughly rule a worker's being such that he is meaningfully cut off from information necessary to enrich, enlighten or relieve his life.

Sources cited in *Marsh* emphasize this principle. *See, e.g.,* 326 U.S., at 508 n.5. In one of the publications referenced in the footnote, "Some Southern Cotton Mills Workers and Their Villages," for instance, the author stresses the inherent alienation and remoteness of a company town:

> "The isolated location of the [company] village, further accentuated by the lack of railway facilities, makes impossible ready contact with centers of business and social activity. Even though two well maintained county highways connect the village with the two nearest towns, four miles distance, there is little contact with other people." *Id.,* at 37-39.

Indeed, any other emphasis would impermissibly jeopardize the workers' true and privileged interests. If, for example, it were asserted that the holding in *Marsh* was solely dependent upon the quality of typically governmental services furnished by the private owner, then the shrewd owner would only need to offer few or no services to gain dominion over his employees' rights. As demonstrated below, this in fact describes the situation of most migrant camps, where workers have no choice but to live without many services which society routinely regards as basic.

Understood in this light, the differences between a company town setting and other private property become manifest for the instant purposes. Thus, a shopping center does not implicate the identical interests which a town does. *See Hudgens v. N.L.R.B.,* 424 U.S. 507 (1976). The population and the activities of a shopping center do not resemble those of a community. The lives of a center's patrons and employees do not vitally rely upon that center; it is merely a place to shop or to work. In short, a shopping center, unlike a community town, does not so *govern* a "resident's" life that that individual loses the capacity to interact freely and frequently with the community at large.

2. **Application of Marsh to this Case: Labor Camps are Residential Communities and the Functional Equivalent of Company Towns.**

As quoted above, the district court entered a finding of fact that migrant labor camps were permanent residential communities for the Arizona farm worker. Consistent with this finding and the court's ultimate holding, migrant camps consequently are the functional equivalent of the *Marsh* company town. See *Petersen v. Talisman Sugar Co.,* 478 F.2d 73 (5th Cir. 1973); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.,* 437 F.Supp. 60 (S.D.N.Y. 1977); *People v. Rewald,* 65 Misc. 2d 453, 318 N.Y.S.2d 40, 43 (Cuyauga Co. Ct. 1971).

To begin, migrant workers do live and work in camps and nearby ranches that are owned and operated by their private employers. Residency in these camps is rarely genuinely voluntary; growers typically enforce camp residency as a condition of employment in order that workers are always readily available to meet the growers' needs.[42] When not at work, the

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[42]See R. Schmitt, The Migrant Farmworker Situation in the U.S. 12 (April 17, 1975) (Library of Congress, Congressional Research Service, HD 5856, E.D. 75-115); *see also* Subcomm. on Agricultural Labor, House Comm. on Education and Labor, 94th Cong., 2d Sess., *Federal and State Statutes Relating To Farmworkers* 95-149 (October 1976) (reprinting *R. Schmitt, supra,* in full and surveying federal and state laws on farm labor housing and other farmworkers issues); Rocky Mountain Regional Office, U.S. Commission on Civil Rights, *People Who Follow The Crops* (June 1978).

worker eats, sleeps, and rests at the camp.[43] Since the camp remains the worker's home for most of the year, they are, as the court found, residential communities in all significant respects.[44]

The communities are isolated. Location of grower-controlled housing usually is at a remote site, far removed from heavily travelled roads, stores, transportation, recreation centers, medical clinics, government offices, churches, and other common public services and facilities.[45]

Moreover, the geographical isolation of the migrant is exacerbated by other factors. The lifestyle which is inseparable from the worker's employment contributes to his alienation from the overall society. As summarized in Sherman & Levy, *Free Access to Migrant Labor Camps,* 57 ABAJ 434, 435 (1971):

> "His long workday, general poverty, and limited transportation make it physically difficult for him to leave the camp or the migrant way of life. His transient status denies him a political voice, both in the migrant stream and in his home state, to demand the service to which he is entitled by law . . . . [L]anguage barriers, color, cultural differences and limited education make it clearly impossible for him to establish a really acceptable life even if he were

[43] *Ibid.*

[44] *See Petersen, supra,* 478 F.2d, at 82; *Franceschina v. Morgan,* 346 F.Supp. 833, (S.D. Ind. 1973); *Folgueras v. Hassle,* 331 F.Supp. 615, 620-625 (W.D. Mich. 1971); Comment, *The Bill of Rights, State Action, and Private Migrant Labor Camps,* 1 Utah Law Rev. 214, 224 (1976) ("The most significant aspect of the migrant labor camp is its function as a residence for migrant workers . . . . [A] migrant camp owner, who can cut off all channels of communication by closing the camp gates, and by so doing restrict the access of camp residents to information, has vested himself with power of such significance as to justify a finding that he has assumed the cloak of government.") [hereinafter cited as "Utah Comment"].

[45] *See generally* President's Commission on Mental Health, *Report of the Task Panel on Mental Health and American Families: Sub-Task Panel on General Issues and Adult Years* 1197 (February 15, 1978). This Presidential study on the mental health of farmworkers concluded that "an agricultural system which permits, [and] even unintentionally encourages, the separation of the farmworkers from the life of the community is a system which causes more misery than can be justified under any circumstances."

> able to assert his legal rights. He is trapped in a situation that is exploited by the grower, and the resulting way of life is marked by extreme fear, and psychological disorientation. Obviously, a serious attempt to break this cycle must begin by securing the right of outsiders to meet the migrant in his own world."

Thus, for example, farm workers are themselves essentially immobile. The economic system under which they operate does not function through individual contracting between worker and employer. Rather, a class of crewleaders supplies and transports the laborers.

These crewleaders exert overwhelming control over the daily lives of the workers. They own the vehicles by which the workers enjoy their only source of transportation. Access to the outside world thereby hinges upon the will and the desire of each worker's crewleader.[46]

In addition, migrants are culturally and financially unable to avail themselves of the principal modes of mass communication resorted to by the mainstream society. Conditions of employment leave them "undereducated, ill-fed, poorly housed and lacking even the most rudimentary health and sanitary facilities."[47] Most migrants do not possess a telephone, and access to a radio or television is unusual. Since the majority of workers are Spanish-speaking and illiterate, community newspapers serve no informational function. *See generally* Note, *First Amendment and the Problem of Access to Migrant Labor Camps after Lloyd v. Tanner,* 61 Cornell L. Rev. 560, 585 (1976) [hereinafter, "Cornell Note"].

The camp owner not only helps create the above conditions, but also typically exploits them. His power is essentially unbounded. Even before the AERA, for example, the Arizona

[46] See Farm Labor Contractor Registration Act of 1974, Senate Report No. 92-1395, 93rd Cong., 2nd Sess. 1-2, 1974 U.S. Code Cong. and Ad. News 6441-6442.

[47] *Ibid.*

owner's determination as to who could enter his property was absolute except in rare cases of court challenges. As stated by the Subcommittee on Migrant Labor of the Senate Committee on Labor & Public Welfare, 91st Cong., 1st Sess., in its Report, *The Migratory Farm Problem in the United States* (S.Rep. No. 91-83) (1969):

> "To the average person it is inconceivable that his landlord should have the right to determine who shall, and who shall not, be able to visit his home. But in the name of property rights, some owners of migrant labor camps presume to bar all outsiders who they . . . determine should not be allowed to see residents of the camp. In this way, they keep out not just peddlers, but union organizers . . . lawyers, and so-called do-gooders who they think might interfere with the docility of their captive work force. . . . Essentially, the camps are *company towns,* and as such, must be opened to the public." *Id.,* at 49. (Emphasis supplied.)

See also Utah Comment, *supra,* at 224; *Folgueras, supra,* 331 F.Supp., at 621.

At the same time, the owner can and does commonly furnish a level of services that is significantly beneath that provided by the Gulf Shipbuilding Corporation in *Marsh. See* Utah Comment, *supra,* at 225 ("The living conditions in migrant labor camps have been documented as among the worst in the United States."); Cornell Note, *supra,* at 567-577.[48]

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[48]In Michigan, for instance, investigators found that 45% of the camps surveyed had defective drainage; 35% had either insufficient or unsafe water supplies; 46% of the houses in the camps had no place to hang clothing; 32% of the homes had no bathing facilities; 62% of the camps had unsanitary toilets; and 70% of the units in the camp were overcrowded. In 39% of the camp units children slept in the same room with their parents. This latter figure was a bright spot—in four states, Wisconsin, Iowa, Minnesota and Washington, 74% of the camps had children and parents sleeping in the same room. See 8-C *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare,* 91st Cong. 1st and 2d Sess. 5690 (July 21, 1970) (reprinting *Preliminary Report on House of Representatives,* Report No. 3113, *Interstate Migration,* 76th Cong., 3d Sess. (January 2, 1941)).

The farm workers' segregation from the society is thus nearly total. To earn a wage, he must live on a labor camp. There, he exists at the beckon of his employer. Physically and culturally removed from the greater community, the worker depends upon the grower for satisfaction of those needs which the grower chooses to meet. In all meaningful aspects then, the farm worker, like the Chickasaw resident, is governed by a private interest upon whose beneficence he is wholly dependent for the realization of his most fundamental rights.

VI. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

DENNIS M. PERLUSS
611 West Sixth Street
Suite 2220
Los Angeles, California 90017

MARK D. ROSENBAUM
FRED OKRAND
TERRY SMERLING
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, California 90005

GILBERT HINOJOSA
LESLIE SUSSAN
GARRY B. BRYANT
Migrant Legal Action
Program, Inc.
806—15th Street N.W.
Washington, D.C.

ALICE BENDHEIM
Arizona Civil Liberties
Union
17 East Thomas Road
Phoenix, Arizona 85012

Attorneys for Amici Curiae

APPENDIX

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ORGANIZATION AND COLLECTIVE BARGAINING OFFER THE BEST HOPE OF IMPROVING THE ABYSMAL LIVING AND WORKING CONDITIONS OF AGRICULTURAL WORKERS

I. INTRODUCTION

The progress of workers in this country has traditionally been the result of the collective bargaining process between management and organized labor. The working conditions and human needs of workers are discussed and resolved through arms-length negotiations based on the parties' relative bargaining strength. Government has correctly viewed its role in this process as restricted to the maintenance of a viable and fair atmosphere in which bargaining may occur. Accordingly, the government has interceded to guaranty fair employment practices, decent wages, safe and suitable working conditions and proper health and welfare programs only when the bargaining system fails to function properly.

Historically, this traditional method for economic and social betterment has been unavailable to farmworkers. Agricultural workers have been excluded from legislation designed to safeguard employees' organizational rights and in some instances, exemplified by Arizona's Agricultural Employment Relations Act (AERA), have been the principal targets of anti-union legislation. Farmworkers have thereby been denied the opportunity provided industrial workers of organizing and resolving their problems through arms-length negotiations.

As a result of the unavailability of collective bargaining, the federal government has been required to create and fund a variety of special programs to regulate the deplorable living and working conditions of farmworkers. Such benefit programs, however, are inherently ineffective because they fail to meet the root cause of farmworker problems, which are to be

found in the basic employment relationship. Union organization and collective bargaining could better deal with most of the evils of the present farm labor system. In fact, where legislation has not obstructed this process—for example, in California —farmworkers have been able to make significant progress.

The major responsibility for the well-being of farmworkers and their families, therefore, must shift from the government to the private parties directly involved in the underlying economic relationships. The urgency of the need for meaningful collective bargaining on behalf of agricultural workers emerges vividly from an overview of the farmworker's living and working conditions.

II. AGRICULTURAL WORKERS ARE AMONG THE MOST DEPRIVED AND POWERLESS GROUPS IN THE UNITED STATES TODAY

A. *Available Information Reveals That Farmworkers Today Work and Live Under Intolerable Conditions.*

1. The Size and Composition of the Agricultural Work Force.

Accurate data concerning the size of the farmworker labor force are virtually nonexistent.[1] The existing federal data are riddled with errors and based on widely different definitions. Two recent studies, however, which offer at least intelligent guesses on the number of farmworkers, suggest that there are approximately 5 million farmworkers and their dependents in the United States today.[2]

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[1]Truman Moore, author of one of the most comprehensive studies of the plight of the migrant worker, has noted that the United States does a better job of counting migratory birds than counting the millions of farmworkers who harvest and process our crops. T. Moore, *The Slaves We Rent* 177 (1965).

[2]D. Lillesand, L. Kravitz, & J. McClelland, *An Estimate of the Number of Migrant and Seasonal Farmworkers in the United States and Puerto Rico* (1977) [hereinafter cited as Kravitz & Lillesand Report]; Rural America, Inc., Research Report 1, *Where Have All The Farm Workers Gone? The Statistical Annihilation of Migrant and Seasonal Farm Workers by Federal Agencies* 59-81 (1977). *See also* President's Commission on Mental Health, *Report of the Task Panel on Mental Health and American Families: Sub-Task Panel On General Issues and Adult Years* 1202 (1978) [hereinafter cited as President's Commission Report].

Farmworkers are predominantly of racial or ethnic minority status.[3] Spanish-speaking persons comprise approximately 50% of the farm labor force, blacks 30%, and whites and others 20% according to recent studies.[4] Average family size for Spanish-speaking migrant farmworkers was 6.4 individuals, for black farmworkers 5.5, and for white and others 4.2.

2. Farmworker Income Figures.

(a) *National Data*

Available data reveal that the annual income averaged $2,130 for Spanish-speaking farmworker families in 1970, $1,558 for black families, and $1,808 for all other farmworker families.[5] The income figures, when combined with the data on family size, show that the individual farmworker is often struggling to support a large number of dependents on a wholly inadequate income.[6]

Most data, moreover, actually overstate farmworker income. For example, workers often incur high expenses in

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[3]President's Commission Report, at 1222.

[4]Kravitz & Lillesand Report, at 76-77, discussing results of several studies.

[5]R. Schmitt, *The Migrant Farmworker Situation in the U.S.* 14 (1975) (Library of Congress, Congressional Research Service, Report # 75-115 ED, HD 5856), referring to data from the 1970 report of the Migrant Research Project of the Office of Economic Opportunity. More recent figures are not much more encouraging. *See, e.g.*, Economics, Statistics and Cooperatives Services, United States Department of Agriculture, Agricultural Econ. Report # 405, *The Hired Farm Working Force of 1976*, at p. 6 (1978), which reports total annual income for all hired farmworkers of $2,860 in 1976, of which an average of $1,651 was earned in farm work. Average daily earnings from farm work were $19.25 with seasonal workers averaging even less. *Id.*, at 4-5.

[6]Division Migrant Programs, Office of National Programs, Manpower Administration, *Report on the Department of Labor Farmworker Task Force* 17 (1973) [hereinafter cited as Report on DOL Farmworker Task Force].

migrating, which are not reflected in income data.[7] In addition, the available figures often represent the wages not of an individual worker but rather combined efforts of an entire family including young children. Furthermore, the data reflect a wage scale bereft of any fringe benefits.[8] The net effect of these intolerably low wages is the inability of farmworkers to provide themselves and their families with even a minimally adequate standard of living.

(b) *Data for Arizona Workers*

As low as are the wages for farm work on a national basis, the available information on Arizona's farmworkers reveals that their earnings are even more limited. Professors Cohen and Rose of Arizona State University have compiled data revealing that for every year from 1965 through 1972, the hourly wages for farmworkers in Arizona were far below the average paid in the adjacent Mountain and Pacific states and were also far below the average in the entire United States.[9]

3. **The Irregular Nature of Farm Employment.**

The low wages paid to farmworkers combine with seasonal periods of unemployment to produce annual incomes far below poverty level. Thousands of members of the workforce do farm work only for brief periods of time. They are able to work only during a single harvest or a few weeks per year. During the rest of the year, some find other temporary employment; some attend school; many others are simply unemployed.[10]

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[7]Secretariat for the Spanish Speaking, National Conference of Catholic Bishops, United States Catholic Conference, *The Migrant Farmworker* § 2.9, at 2-8 to 2-11 (1976) [hereinafter cited as U.S. Catholic Conference, *The Migrant Farmworker*].

[8]*Id.* § 2.4, at 2-3.

[9]Rose & Cohen, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 Law & Soc. Order 313, 317-21.

[10]*The Hired Farm Working Force of 1976, supra* note 5, at 4-7. *See also* J.H. Burton, *The Unionization of Farm Workers* 3-4 (1977) (Library of Congress, Congressional Research Service, Report # 77-88E).

Because of the seasonal nature of farm work, a farmworker who must plan on making a large percentage of his annual income during a short season can be financially devastated by drought, crop disease and insects, equipment failure, poor market conditions or an oversupply of labor. In fact, the view has been expressed that the seasonal nature of their work is the most significant problem faced by the farmworkers:

> "Perhaps the most serious disability suffered by the migrant is his irregular, discontinuous, and uncertain employment."[11]

The seasonal nature of farm work in any specific area, coupled with the fluctuating availability of jobs even during the season, force many farmworkers to migrate, intrastate or interstate, in search of employment.[12] The consequences of frequent migration constitute the most disruptive aspect of farm work, affecting all areas of the lives of farmworkers and their families:

> "They move from one community to another, a part of none, forever outsiders, isolated from the life of the community, living outside its boundaries in filthy labor camps, always moving as the crops ripen and the next harvest beckons. Nor are they able to establish a community within the migrant stream: each season they may travel with different companions, dependent upon the vagaries of weather, crop failures, equipment breakdowns

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[11]8-C *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare,* 91st Cong., 1st and 2nd Sess. 6040 (July 14, 1970) (reprinting *Preliminary Report on House of Representatives,* Report No. 3113, *Interstate Migration,* 76th Cong., 3d Sess. (January 2, 1941)). [Further citations to these hearings will be by part number and the short title Farmworker Powerlessness Hearings. These comprehensive hearing reports give excellent insight into the range of problems faced by farmworkers and some of their causes.] *See also* President's Commission Report, *supra* note 2, 1214; 3B Farmworker Powerlessness Hearings, at 985 (United States Commission on Civil Rights, Staff Report on Farm Workers).

[12]President's Commission Report, *supra* note 2, at 1204-1206.

and other factors over which they have no control. Often their families move with them, the children attending one school after another, or working the fields to help the family earn enough money to survive. Schooling at best, is a stop-and-start sporadic process—one from which many drop out, discouraged by what they perceive as *their* failure, thus decreasing their chances to alter their lives substantially. Their sense of self-worth and self-esteem suffers as a direct result; many come to feel that they are dispensable and of little value."[13]

4. **Farmworker Housing Conditions.**

The wretched housing conditions of farmworkers have been recognized repeatedly. The dependency of the workers on growers to provide housing to them and their families allows inhumane conditions to continue uncorrected, despite publicity and in defiance of federal laws.[14]

5. **Health and Safety Problems.**

Grueling work, poor housing and sanitation, inadequate medical services, child labor and, most important, low wages all

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[13]*Id.*, at 1197. *See also* Compliance and Enforcement Division Office of Equal Opportunity, United States Department of Agriculture, *On the Migrant Farmworker . . . America's Forgotten Farmer* (March 1976) [hereinafter cited as USDA, *On the Migrant Farmworker*].

[14]*See, e.g.*, United States Commission on Civil Rights, Staff Report of Rocky Mountain Regional Office, *People Who Follow the Crops* (1978); U.S. Catholic Conference, *The Migrant Farmworker, supra* note 7, § 2.7 at 2-6 to 2-8; Report on DOL Farmworker Task Force, *supra* note 6, at 15-16; President's Commission Report, *supra* note 2, at 1283-1286.

The persistence of the problem is apparent from a 1970 statement describing appalling conditions that are largely unchanged today:

> "We saw housing and living conditions horrible and dehumanizing to the point of disbelief . . . without heat, adequate light or ventilation, and containing no plumbing or refrigeration. Each room (no larger than 8x14 feet) is the living space for an entire family, approximately suggesting slave quarters of earlier days. . . ."

Farmworker Powerlessness Hearings, at 4982 (July 20, 1970) (Statement of Dr. R.M. Wheeler). *See also* 3B Farmworker Powerlessness Hearings, at 994 (U.S. Commission on Civil Rights Staff Report on Farmworkers).

contribute to the health problems of migrants. The migrant has an average life expectancy significantly shorter than the average national life span.[15]

The infant and maternal mortality rate for farmworkers is two and a half times that of the national average; they have higher mortality rates for infections and other preventable diseases such as tuberculosis, influenza, pneumonia and respiratory disorders.[16] Malnutrition and severe vitamin deficiency also contribute to the deplorable health conditions of farmworkers.[17]

Farm work is also extremely hazardous, representing the third highest death and serious injury rate of all occupations.[18] The disability rate for migratory or seasonal farmworkers and members of their families is three times that of the general U.S. population.[19]

One of the most significant health and safety hazards related to farm work is the use of pesticides.

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[15]B. Thedinger, *Research Into the Current Plight of Farmworkers in the United States* 31 (1976) (paper of the Catholic Diocese of Kansas City—St. Joseph, Mo., distributed by National Institute of Education, United States Department of Health, Education and Welfare as ERIC Report # RC-009-110/ED-121-513).

[16]Report on DOL Farmworker Task Force, *supra* note 6, at 16-17. *See also* U.S. Civil Rights Commission, *People Who Follow the Crops, supra* note 14. Dr. Raymond M. Wheeler has also observed instances of rickets and leprosy and widespread occurrences of urinary infections, intestinal parasites and ear disease. Farmworker Powerlessness Hearings, at 4980-4992 (statement of Dr. R.M. Wheeler).

[17]I.E. Harrison, Pennsylvania Department of Health, Behavioral Science Working Paper 72-3, *Migrant Papers* 58-59 (1972).

[18]U.S. Commission on Civil Rights, *People Who Follow The Crops, supra,* citing National Safety Council, *Accident Facts* (1971). 3B Farmworker Powerlessness Hearings, at 994 (U.S. Commission on Civil Rights, Staff Report on Farm Workers).

[19]B. Thedinger, *supra* note 15, at 31. *See generally, id.* at 31-35. *See also* Occupational Safety and Health Reporter (BNA) 1145-1149 (November 30, 1978), for the most recent results of Bureau of Labor Statistics Surveys, which rank agriculture as having the highest occupational injury and illness incidence rate.

> "The pesticide problem would appear to be the literal apotheosis of the migrant farm workers' dilemma. These people are prey to the most unspeakable of occupational health hazards—death through nerve gas asphyxiation, and yet they are unprotected by safety legislation in all states save California . . . . Employers won't even recognize their right to safe and healthful workplaces—a right purportedly guaranteed by every state industrial accident commission in this country to every workingman and woman, as a 'bargaining' point. Then what we have is a class of workers who rival the 'helots' of ancient Sparta who were slaughtered at the whim and discretion of the warring Spartan landowners."[20]

Information establishing the extent of farmworker exposure to pesticides is woefully lacking. The Food and Drug Administration has estimated that some 800 to 1,000 fieldworkers are killed and 80,000 to 90,000 are injured by pesticides annually.[21]

The total impact of these assaults on farmworker health spreads into all areas of farmworkers' lives. Their ability to

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[20]6A Farmworker Powerlessness Hearings 3196 (August 1, 1969) (Statement of Jerome B. Gordon). The entire Parts 6-A and 6-C of the Farmworker Powerlessness Hearings are devoted to the deleterious effects of pesticide exposure on farmworker health.

[21]B. Thedinger, *supra* note 15, at 37. Less well known, but equally serious, are the long-term consequences of exposure to low hazard pesticides. Recent research suggests severe neurologic and carcinogenic effects in pesticides that were previously considered "mild." Howitch & Moore, *International Health Effects of Pesticides,* University of California, Davis, Economic Research Service; Metcalf & Holmes, *EEG, Psychological and Neurological Alterations in Humans With Organophosphate Exposure, 160 Annals of the New York Academy of Sciences* 357-365 (1969); Van Gelder, et. al., *The Effects of Dieldrin and Ruelene Exposure on Experimental Behavior and the Electroencephalogram,* Environmental Health Sciences Series 125; Rayner, et. al., *Hyporeflexia in Workers Chronically Exposed to Organophosphate Insecticides,* 4(3) Research Communications in Chemical Pathology and Pharmacology 596 (1972); President's Commission Report, *supra* note 2, at 1245-1249.

earn a living, their children's ability to profit from education, and the ability of all members of the family to cope with their demanding life are all impaired.[22]

6. The Generational Nature of Farmworker Problems.

Farmworkers attain an educational level four years below that of most other groups in the nation,[23] with black and Spanish-speaking farmworkers suffering the largest setbacks. The school dropout rate for migrant children is similarly bleak. They have only a 40% chance of entering the 9th grade, and an 11% chance of entering the 12th grade.[24]

The National Education Association reported that a number of factors were responsible for the high dropout rate and other educational problems of migrant children:

> "(1) geographic mobility; (2) the use of child labor to supplement meager family earnings; (3) poor health, nutritional deficiencies, and exposure to the hazardous environmental conditions of farm work; (4) the discriminatory practices and negative attitudes of community and school personnel; (5) the inability of traditional monolingual school systems to deal with the multicultural, multilingual backgrounds of migrant children; (6) the lack of continuity in educational programs for these mobile

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[22]*See* President's Commission Report, *supra* note 2, at 1221-1239, concluding that only structural change, including protection of their right to organize, can improve farmworker mental health (at 1228) and recommending the creation of hope, power and self-esteem as remedies (at 1231).

[23]In 1973 farmworkers had a median educational level of 8.4 years while all other workers had a median education of 12.4 years. Those of Spanish origin obtained only 4.5 median years of education, compared to black farmworkers' median of 5.8 years and Anglos' 9.7 years. B. Thedinger, *supra* note 15, at 42.

[24]National Child Labor Committee, *Promises to Keep: The Continuing Crisis in the Education of the Migrant Child* (1977). The farmworker dropout figures should be compared to those of the non-farmworker, who has a 96% chance of entering 9th grade and 80% chance of entering 12th grade. *See also* USDA, *On the Migrant Farm Worker, supra* note 13, at 11 (most migrants have a 4th grade education).

children, and the inability of traditional school systems to recognize the need for interstate transfer of academic credits earned by migrant students."[25]

These educational problems of farmworkers are particularly distressing because they foretell the continuing plight of future generations of farmworkers.

B. *The Problems Of The Farmworkers Are Bound To Their Employment Relationship.*

Certainly, farmworkers are not the only disadvantaged group to face the problems of racial discrimination, poverty, poor housing, bad health, and educational deficiencies. The problems of the farmworker, however, are uniquely bound to his employment relationship. This interrelationship between the worker and the work was aptly described by the United States Department of Labor Task Force:

> "Farmworkers suffer from the same economic and social problems as other poor people but to a greater degree. Among classes of the disadvantaged designated for special Federal attention, only farmworkers are an occupational group. Their plight is unique because it is their working conditions (the seasonal and sometimes mobile nature of their jobs, the exclusion from the protections of job-related social legislation, the long hours and low pay, and the other egregious realities of agricultural hand labor) which give rise to most of the other problems endemic to farmworkers such as child labor, short life expectancy, poor nutrition, job insecurity, incidence of disease, inadequate housing, and powerlessness."[26]

The situation of Arizona's farmworkers mirrors, and in some respects exceeds, this bleak national picture with respect

[25]President's Commission Report, *supra* note 2, (reporting presentation to sub-panel by Roy Fuentes, Manager, National Education Association Migrant Project, June 1977).

[26]Report on DOL Farmworker Task Force, *supra* note 6, at 98.

to income, housing, health and educational problems.[27] The dilemma confronting Arizona farmworkers, as is true for many of this nation's other agricultural workers, is that without any power over their working conditions, they cannot substantially improve their lot in life no matter how hard they work.

C. *Federal Benefit Programs Cannot Adequately Resolve The Problems Confronting The Nation's Farmworkers.*

Until recently, most of this country's social and labor legislation has excluded farmworkers, thereby contributing to the existence of substantial poverty and inadequate living conditions.[28] Farmworkers, unlike any other group, have been either totally excluded from or denied the full benefits of such laws as the Fair Labor Standards Act,[29] workmen's com-

[27]Cohen & Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis, supra* note 9, at pp. 315-321 (providing a detailed survey of Arizona's farm labor force, including seasonal and migratory employment and average wages). *See also* Economics, Statistics and Cooperatives Service, United States Dept. of Agriculture, *Farm Labor* (Washington, Nov. 1978) (containing more recent data concerning Arizona farm labor force).

[28]Moberly, *Collective Bargaining Laws and Agricultural Employers: Some Necessary Changes,* 2 L. Forum 469 (1976). *See also* C. McWilliams, *Factories in the Field* (1939); E. Nelson, *Huelga* (1961); Chase, *The Migrant Farmworker in Colorado—The Life and the Law,* 40 Colo.L.Rev. 45 (1967); Note, *Migrant Farm Labor in Upstate New York,* 4. Colum. J. Law Soc. Probs. 1 (1968).

[29]Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1978), as amended Pub. L. No. 89-601, 80 Stat. 830 (1966), Pub. L. No. 93-259, 88 Stat. 55 (1974), and Pub. L. No. 95-151, 91 Stat. 1245 (1977) [hereinafter FLSA]. Originally, farmworkers were not covered by the FLSA at all. In 1966 wage guarantees were extended to farmworkers for the first time. The rate was lower than for non-farmworkers and applied only to farmworkers working for large farms (an employer who used more than 500 mandays of agricultural labor in any calendar quarter of the preceding calendar year). In 1974 amendments provided for a gradual phasing-in of a farm wage rate that would become equal to the non-farm rate. Parity has been achieved as of January 1, 1978 with a wage rate of $2.65 per hour.

Farmworkers have never been protected by FLSA's overtime provisions. See 29 U.S.C. §§ 207, 213(a)(12).

pensation,[30] unemployment compensation[31] and Social Security.[32] Finally, farmworkers are totally excluded from the national labor laws, which guarantee other workers the right to organize and bargain collectively and which govern other labor-management activities.[33]

While farmworkers have been excluded from the benefits of most labor laws, Congress has passed some protective legislation in an attempt to ameliorate the desperate plight of farmworkers. Significant examples of such legislation include the Migrant Health Act,[34] the Occupational Safety and Health Act,[35] certain amendments to the Fair Labor Standards Act,

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[30]See Bull, *Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.*, 20 Catholic Lawyer 233, 251 (1974), discussing state exclusions of farmworkers from workmen's compensation laws.

[31]See Note, *The Farmworker: His Need for Legislation*, 22 Maine L. Rev. 213, 234 (1970).

[32]*Id.*, at 229. *See generally* President's Commission Report, *supra* note 2, at 1215-1216.

[33]The exclusion of agricultural workers is found at § 2(3) of National Labor Relations Act, as amended, 29 U.S.C. § 152(3).

[34]Migrant Health Act, as amended, 42 U.S.C. § 247d.

[35]Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1973) [hereinafter OSHA]. OSHA requires that each covered employer:

> "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

Pursuant to the OSHA, the Secretary of Labor is empowered to set standards for safe and healthy working conditions in all industries affecting interstate commerce, including agriculture. However, despite this broad statutory authority, the only health and safety standards promulgated to protect farmworkers generally are Temporary Labor Camps, 29 C.F.R. 1910.142; Roll-over Protective Structures for Agricultural Tractors, 40 Fed. Reg. 18,254 (April 25, 1975); and Guarding of Farm Field Equipment, Farmstead Equipment and Cotton Gins, 41 Fed. Reg. 10,190 (May 9, 1976). The Secretary of Labor has refused to extend basic sanitation protections to farmworkers, even in the face of litigation. *See National Congress of Hispanic American Citizens v. Usery*, 544 F.2d 1196 (D.C. Cir. 1977) (the Secretary may depart from statutory timetable in promulgating agricultural standards in good faith effort to allocate available resources). No other agricultural standards will be issued in the foreseeable future. *See* Secretary's Timetable

which now includes farmworkers within its minimum wage guarantees and its protections against the use of child labor[36] and the Farm Labor Contractor Registration Act.[37] Unfortunately, despite the expenditure of several billion dollars of federal monies over the past 15 years, these legislative efforts have proved largely ineffective in improving or changing the conditions of farmworkers.[38]

Following a review of the various federal programs affecting farmworkers and their dependents, the President's Commission on Mental Health concluded that the programs were a complete failure:

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for Development of Agricultural Occupational Safety and Health Standards for Field Sanitation, Noise, Nuisance Dust and Personal Protective Equipment, *National Congress of Hispanic American Citizens v. Usery*, No. 2142-73 (D.D.C., timetable filed September 22, 1978) (on remand).

[36]*See* note 29, *supra*.

[37]Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041-2055 (Supp. V 1978) [hereinafter FLCRA]. FLCRA was originally enacted to curb the abuse of farmworkers by farm labor contractors, who frequently misrepresented working conditions, made excessive deductions from farmworkers' wages and furnished substandard housing. Unfortunately, congressional hearings revealed that enforcement of the Act by the Department of Labor between 1963 and 1973 was virtually non-existent.

> "The Act has failed to achieve its original objectives. It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act were [sic] intended to regulate has become the rule rather than the exception."

S. Rep. No. 93-1295, 93d Cong. & Ad. News 6441, 6443.

This record of nonenforcement led to enactment of the 1974 amendments, which provided a wider range of sanctions to the Department of Labor, required the Department of Labor to investigate and monitor crewleader activities and created a private cause of action on behalf of the aggrieved workers. Even this enhancement of workers' remedies, however, has not led to more effective enforcement. National Association of Farmworker Organizations, *An Analysis of the Department of Labor's Services for Farmworkers* 64-82 (May 1978) (paper prepared under DOL Contract No. 99-77-1089-36-45); *Alexander v. Brennan*, No. 74-76 (D.D.C., June 18, 1976).

[38]President's Commission Report, *supra* note 2, at 1196; NAFO Report, *supra* note 37.

"[B]y any outcome criteria the programs must be counted as having failed to effect substantial improvements in the lives of farmworkers, whose general condition has not significantly improved during this time span. Laws, however noble in intent, are not enforced. Access to generic programs for the poor may have been improved, yet farmworkers still do not participate in these programs in proportion to their needs. Categorical programs overlap, duplicate services, and fail to address the needs of the total farmworker family in any comprehensive manner."[39]

Of the ineffectiveness of the federal effort under the Migrant Health Act, the Department of Labor Farmworker Task Force stated:

"Because of limited funding and increasing medical costs, the Migrant Health Act which attempts to provide services to farmworkers is only serving about 3% of the nation's farmworkers. Services provided under this program are short-range and do not cover long-range medical needs."[40]

The federal government's efforts to provide every employee with a safe and healthful working environment as applied to farmworkers have also failed to effect the necessary change in conditions:

"There is consensus among farmworker advocates that OSHA standards, as well as other standards regarding farmworker housing, pesticide use, occupational safety, and health are largely inadequate, ignored, or unenforced."[41]

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[39]President's Commission Report, *supra* note 2, at 1288. *See also* Report on DOL Farmworker Task Force, *supra* note 6, at 98.

[40]Subcommittee on Migratory Labor, Senate Committee on Labor and Public Welfare, *Migratory Farm Labor Problem in the United States*, S. Rep. No. 91-93, 90th Cong., 1st Sess. 27 (1969), cited in Report on DOL Farmworker Task Force, *supra* note 6, at 17.

[41]President's Commission Report, *supra* note 2, at 1244; *see* NAFO Report, *supra* note 37, at 13-58. *See also* note 35, *supra*.

Sixty-five percent (65%) of the nation's farmworkers are still excluded from even minimum wage coverage under FLSA.[42] Despite the 1974 Amendments, attempts to halt exploitation of farmworkers by crewleaders under FCLRA have "failed tragically," and farmworkers are thereby prevented "from controlling the most basic elements of their existence."[43]

These failures of federal benefit programs are endemic to a farm labor system that keeps farmworkers powerless to alter their own living and working conditions.[44] Farmworkers are the only *occupational* group in this country that have had to be the intended beneficiaries of such a substantial expenditure of the taxpayers' money. They are the true working poor, whose hard labor still cannot provide for their families' basic needs:

"The burden of providing the human services which the farmworker and his family so desperately need falls not upon the employer of the farm laborer but upon the taxpayer, who must assume the cost of providing these services. In no other industry have the economic risks been shifted so directly from management to the public, which must compensate, through the provision of human services, for the abuses which the farmworker endures as a result of the agricultural industry's failure to attend to the needs of its own work force."[45]

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[42]President's Commission Report, *supra* note 2, at 1242; NAFO Report, *supra* note 37, at vii-viii, 84-97. *See also* note 29, *supra*.

[43]President's Commission Report, *supra* note 2, at 1218, 1244-1245; *see* NAFO Report, *supra* note 37, at vii-viii, 63-82. *See also* note 37, *supra*, for history of FLCRA.

[44]The President's Commission on Mental Health, Task Panel on Migrant and Seasonal Farmworkers, has pointed out that legislative exclusions, poor enforcement and lack of coordination do not tell the whole story:

"However, the temptation to view these efforts simply as failures of coordination must be avoided. The panel believes that the failures of federal programs are the outcome of an agricultural system that continues to isolate farmworkers, keeps them locked in a continuing cycle of poverty, and prevents their full participation in our national life."

President's Commission Report, *supra* note 2, at 1288.

[45]*Id.*, at 1197.

The primary responsibility for the well-being of farmworkers and their families must shift from the government to the private agricultural industry.[46] The only viable mechanism for the effective resolution of the problems of farmworkers may well be the collective bargaining process. This conclusion has been widely endorsed by those who have studied the conditions of farmworkers and the needs of the agri-business community.[47]

Indeed, this Court, in protecting the rights of farmworkers to organize and engage in concerted activity free of intimidation by Texas state authorities, recognized the deplorable conditions suffered by farmworkers and the vitality of the organizational process in dealing with those problems:

> "The appellees [U.F.W.O.C.] sought to do no more than organize a lawful union to better the situation of one of the most economically oppressed classes of workers in the country." *Allee v. Medrano,* 416 U.S. 802, 814 (1974).

Similarly, the President's Commission on Migratory Labor concluded more than twenty-five years ago that self-organization offers farmworkers the best method for improving their working conditions:

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[46]Nor can the existing private enforcement remedies provide sufficient relief. Access to legal services is limited. Litigation is impeded by the mobility of the workers, by lack of resources and by the farmworkers' ignorance of his few legal rights. *See* U.S. Commission on Civil Rights, *People Who Follow The Crops, supra* note 14.

[47]*See, e.g.,* R. Schmitt, *supra* note 5, at 23; Report on DOL Farmworker Task Force, *supra* note 6, at 93-94 ("In our political/economic system, workers' wages and working conditions are most likely to be improved through collective bargaining."); President's Commission Report, *supra* note 2, at 1249; D. Nelkon, *On the Season: Aspects of the Migrant Labor System* 77 (1970) (New York State School of Industrial and Labor Relations, Cornell Univ); 3B Farmworker Powerlessness Hearings 1005 (July 16 and 17, 1969) (U.S. Commission on Civil Rights, Staff Report on Farm Workers); G. Baker, *The Invisible Workers: Labor Organizations on American Farms* in *Radical Agriculture* 143-167 (B Merrill ed. 1976).

> "The Commission is convinced that balanced organization and effective collective bargaining would be of great assistance not only to farmworkers, who would thereby be given a voice in determining wages and conditions of employment, but it would contribute also to more orderly management of labor. In the long run, self-organization is the method by which agricultural workers can best improve their working condition."[48]

The validity of these conclusions become strikingly clear when the effectiveness of the collective bargaining process is compared with the futile federal efforts to improve farmworkers' lives.

III. THE PROBLEMS OF FARMWORKERS CAN BEST BE MET THROUGH ORGANIZATION AND COLLECTIVE BARGAINING

The majority of pressing problems surveyed above are amenable to resolution through the collective bargaining process. Such issues are, in fact, the essential subjects of union-management negotiations elsewhere. This self-help approach is vastly preferable to wasteful and scattered government intervention.

Instead of attempting to address the health needs of farmworkers through the Migrant Health Act, the workers could resolve their own health problems by developing health insurance and pension plans, obtaining paid sick leave and negotiating to improve farm safety.[49] Rather than rely on the minimum wage protections of the Fair Labor Standards Act, the workers could negotiate for higher wages and maximum

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[48]8C Farmworker Powerlessness Hearings 6180 (July 24, 1970) (The President's Commission on Migratory Labor, *Migratory Labor in American Agriculture,* March 26, 1951).

[49]3B Farmworker Powerlessness Hearings 1007 (July 16 and 17, 1969) (U.S. Commission on Civil Rights, Staff Report on Farm Workers).

hour protection.[50] Farmworkers could totally eliminate the recognized evils of the farm labor contractor system through the signing of union contracts and the use of union hiring halls rather than rely upon the protective paternalism of the Department of Labor.[51]

The effectiveness of collective bargaining as a means of resolving farmworkers' problems is evidenced by the improved condition of California farmworkers since unionization has become possible there:

> "The UFW has made gains for California's farmworkers. Over the past decade, the prevailing wage for field labor has risen from just over a dollar an hour to better than $2.25 in 1974. This compares well with the federal minimum wage for agriculture ($1.60 in 1974), and the UFW can take credit for exerting the pressure that has driven wages up. Union workers, of course, are better paid than the average; the Almaden vineyards, which are under UFW contract, pay their field workers $2.75 an hour (in 1974) and their tractor drivers $3.80.
>
> "Union contracts specify what pesticides may be used and how much time must pass after the fields are sprayed before workers can return. The United Farm Workers has a death benefit plan for its members and, in some areas, provides a credit union and medical services. But the most important change brought by the UFW on the ranches where it has won contracts is the elimination of the labor contractor system."[52]

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[50] *Id.*, at 1007; 8C Farmworker Powerlessness Hearings 6179 (July 24, 1970) (The President's Commission on Migratory Labor, *Migratory Labor in American Agriculture,* March 26, 1951).

[51] 8C Farmworker Powerlessness Hearings, *supra* note 49, at 6180.

[52] Dunbar & Kravitz, *Hard Travelling* 45 (1976). *See* B. Thedinger, *supra* note 15, at 49 ("In California, in the given years following the grape boycott, wages and fringe benefits nearly doubled and important gains in field conditions were won by the United Farm Workers."). *See also* U.S. Catholic Conference, *The Migrant Farmworker, supra* note 7, at 5-6; J.H. Burton, *supra* note 10, at 25-30.

Of course, the rights of California farmworkers to organize and bargain collectively are secured to them by the California Agricultural Labor Relations Act [hereinafter cited as CALRA],[53] which was intended to enable farmworkers to utilize the collective bargaining system in a fair and effective manner.[54]

Unlike the CALRA, the Arizona Agricultural Employment Relations Act can only be depicted as an anti-labor law.[55] The impossible procedures provided by the AERA and the lack of worker confidence in its organizing and election provisions are revealed by the fact that since its passage in May 1972, only nine petitions for elections have been filed. Of these, four were withdrawn prior to any elections being held; only three elections have actually been held.[56] The experience under the CALRA is, by contrast, quite illuminating:

> "By January 1976, after five months of operation, the board had received 604 election petitions and had conducted 423 elections involving approximately 50,000 farmworkers."[57]

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[53] California Labor Code §§ 1140 *et seq.* (West Supp. 1976).

[54] *See generally* Rochin, *New Perspectives on Agricultural Labor Relations in California,* 28 Labor L.J. 395-402 (1977); J.H. Burton, *supra* note 10; Levy, *Agricultural Labor Relations Act of 1975—La Esperanza de California Para el Futuro,* 15 Santa Clara Lawyer 783 (1975).

[55] *See generally* Cohen & Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretive and Comparative Analysis,* 1973 L. & Soc. Ord. 313-72; Rose, *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—A Constitutional Analysis,* 1973 L. & Soc. Ord. 373-431; Moberly, *Collective Bargaining Laws and Agricultural Employees: Some Necessary Changes,* 1976 L. Forum 469-508. *See also* Appendix, at 79-92 (stipulated Statement of Status of Past and Pending Actions taken in Accordance With the Agricultural Employment Relations Act, filed January 21, 1977).

[56] Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With the Agricultural Employment Relation Act, filed January 21, 1977, and Stipulation Regarding Harvest and Pre-Harvest Seasons, Cactus Ranch Data, *United Farm Workers Nat'l Union v. Babbitt,* 449 F. Supp. 449 (D. Ariz. 1978), *reprinted in* Appendix at 79, 192.

[57] Agricultural Labor Relations Board, *First Annual Report for the Fiscal Years Ended June 30, 1976 and June 30, 1977,* at page 10 (January 24, 1978).

IV. CONCLUSION

The desperate plight of the farmworker, the ineffective and wasteful efforts of the federal government, and the hope and promise of collective bargaining were best summarized by then-Senator Walter Mondale during the hearings before the Subcommittee on Migratory Labor:

> "I have a lot less hope that the bureaucracy is going to be truly meaningful and relevant in their effort to respond to migrants than do many people who have studied this problem. I think the migrants have suffered from an overdose of malignant paternalism. It is a wonderful way for white people to work out their guilt feelings. Eleanor Roosevelt visited them, and we had films and documentaries such as 'Harvest of Shame.' Two years ago we had the educational television people do a follow-up to 'Harvest of Shame.' Now, thank goodness, NBC is going to go back again.
>
> "We are going to have another 'Harvest of Shame' revisited, and we are just having a wonderful time studying and restudying the migrants. The single most significant aspect of the studies is that the situation is continuing to grow worse in its tragedy. The whole migrant stream continues to be refueled daily along the Mexican border, California and Texas, and this has national ramifications.
>
> "After these many years we have a sort of ritual where we come up with new plans, new ideas, and new suggestions, but all of them have the same paternal base. Every program is phrased in terms of: 'This is something we are going to do for them.'
>
> "I wonder whether much more time and much more hope might be found in structuring programs that permit the migrants to do something for themselves. For example, the right to organize and bargain collectively, the right to strike . . . .

> "If we just did that, I think the economic position of the average farmworker and migrant would be demonstrably improved."[58]

This Court, of course, cannot judicially legislate for farmworkers those labor rights that have been enjoyed by all other working people in our nation for the last half century. However, an anti-labor law, as riddled with obstacles to workers' constitutionally-protected activities as is the Arizona Agricultural Employment Relations Act, is a shameful affront to accepted public policy. As demonstrated in the body of this brief and in the opinion of the three-judge court, it is also an unconstitutional infringement on the fundamental rights of Arizona's farmworkers and therefore cannot be judicially tolerated.

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[58] 7B Farmworker Powerlessness Hearings, at 4561 (Statement of then-Senator W. Mondale).

DIVISION, BOARD OF GLOBAL MINISTRIES, UNITED METHODIST CHURCH; NATIONAL FARM WORKER MINISTRY; NATIONAL FEDERATION OF PRIESTS' COUNCILS; NATIONAL ASSEMBLY OF WOMEN RELIGIOUS; NETWORK, A CATHOLIC LOBBY FOR SOCIAL JUSTICE LEGISLATION; NEW YORK STATE COUNCIL OF CHURCHES; OUR LADY OF VICTORY MISSIONARY SISTERS; P.A.D.R.E.S. (PADRES ASOCIADOS PARA DERECHOS RELIGIOSOS EDUCATIVOS SOCIALES); RELIGIOUS OF THE INCARNATE WORD; RELIGIOUS OF THE SACRED HEART, CALIFORNIA PROVINCE; SISTERS OF LORETTO; SISTERS OF THE PRESENTATION, SOCIAL JUSTICE COMMITTEE; SISTERS OF THE COMPANY OF MARY; SISTERS OF NOTRE DAME DE NAMUR, MARYLAND PROVINCE; SOCIAL ACTION COMMITTEE OF THE PAULIST FATHERS; TUCSON ECUMENICAL COUNCIL; UNITED CHURCH BOARD FOR HOMELAND MINISTRIES; UNITARIAN-UNIVERSALIST ASSOCIATION; UNITED PRESBYTERIAN CHURCH IN THE USA; AND WISCONSIN MIGRANT MISSION;

AMICI CURIAE

DENNIS M. PERLUSS
611 West Sixth Street
Suite 2220
Los Angeles, California 90017

MARK D. ROSENBAUM
FRED OKRAND
TERRY SMERLING
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, California 90005

GILBERT HINOJOSA
LESLIE SUSSAN
GARRY B. BRYANT
Migrant Legal Action
Program, Inc.
806-15th Street N.W.
Washington, D.C.

ALICE BENDHEIM
Arizona Civil
Liberties Union
17 East Thomas Road
Phoenix, Arizona 85012

Attorneys for Amici Curiae